Supreme Court, U.S.
FILED
00-491 SEP 25 2000
OFFICE OF THE CLERK

No.

In the

Supreme Court of the United States

STEVENS CREEK QUARRY, INCORPORATED,

Petitioner,

versus

SANTA CLARA COUNTY PLANNING COMMISSION, THOMAS TANNER; CHARLES REED; PAT SAUSEDO; MOHINDER MANN; BRENT VENTURA; NICOLAS HOLGUIN; DIANNE MCKENNA; MICHAEL HONDA; BLANCA ALVARADO; RON GONZALES; JAMES T. BEALL, JR.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

JOHN M. TAYLOR
Attorney for Petitioner
Taylor Hooper & Wiley
Suite 300
1435 River Park Dr
Sacramento, Ca 95815
(916) 929-5545

MARINA TRAMONTOZZI
Counsel of Record
c/o Curry & Taylor
Suite 601-S
815 15th Street, N.W.
Washington, D.C. 20005
(202) 393-1070

34pp

ISSUE PRESENTED

WAS IT ERROR TO CONVERT THE PLAINTIFF'S SUBSTANTIVE DUE PROCESS CLAIM, WHICH ALLEGED THE VIOLATION OF A NON-PROPERTY-BASED FUNDAMENTAL RIGHT, INTO A TAKINGS CLAIM?

RULE 29.6

Stevens Creek Quarry, Inc., is a privately-held corporation, having no parent corporations. No publicly-held company owns any shares of Stevens Creek Quarry, Inc., stock.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

RULE 29.6 STATEMENT ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 1

RELEVANT CONSTITUTIONAL , STATUTORY ORDINANCE PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE WRIT 4

CONCLUSION 11

APPENDIX

CIRCUIT COURT OPINION 1a

DISTRICT COURT OPINION 4a

ORDER 16a

TABLE OF AUTHORITES

Federal Cases

ALBRIGHT V. OLIVER, 510 U.S. 266 (1994) 3

ARMENDARIZ V. PENMAN, 75 F.3D 1311 (9TH CIR. 1996) (EN BANC) 6

BICKERSTAFF CLAY PRODS. CO. V. HARRIS COUNTY, 89 F.3D 1481 (11TH CIR. 1996) 6

BUCKLES V. KING COUNTY, 191 F.3D 1127 (9TH CIR. 1999). 6

COUNTY OF SACRAMENTO V. LEWIS, 523 U.S. 833 (1998).... 7

ERZNOZNICK V. CITY OF JACKSONVILLE, 422 U.S. 205 (1975) 8

GRAHAM V. CONNOR, 490 U.S. 386 (1989) 3

JOHNS CORPORATION V. CITY OF HOUSTON, 214 F.3D 573 (5TH CIR. 2000) 7

MACRI V. KING COUNTY, 126 F.3D 1125 (9TH CIR. 1997)..... 6

MOORE V. CITY OF EAST CLEVELAND, 431 U.S. 494 (1977) 7

SCHAD V. BOROUGH OF MOUNT EPHRAIM, 452 U.S. 61 (1981) 8

TRI COUNTY INDUS. V. DISTRICT OF COLUMBIA, 104 F.3D 455 (D.C. CIR. 1997) 6

UNITED STATES V. LANIER, 520 U.S. 259 (1997) 7

VILLAGE OF WILLOWBROOK v. OLECH, 120 S. CT. 1073 (2000) 7

Federal Statutes

28 U.S.C. § 1254(1) 1

42 U.S.C. § 1983 ..... 1, 3

Other Authorities

THOMAS E. ROBERTS, TAKINGS, DUE PROCESS, AND PREEMPTION, 29 URB. LAW. 399, 408 (1997) 10

OPINIONS BELOW

The opinion of the Ninth Circuit Court of Appeals (Appendix, *infra*, pp. 1a-3a) was not reported. The opinion of the District Court for the Northern District of California (Appendix, *infra*, pp. 4a-15a) was not reported.

JURISDICTION

The Judgment of the Ninth Circuit Court of Appeals (Appendix p. 1a), as modified on denial of the Petitioner's Petition for Rehearing and Rehearing en banc, was entered on June 29, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTE INVOLVED

1. The Due Process Clause of the Fourteenth Amendment of the United States Constitution, which provides:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law; . . . .

2. The Takings Clause of the Fifth Amendment of the United States Constitution, which provides:

> [N]or shall private property be taken for public use, without just compensation.

3. The Civil Rights Act, 42 U.S.C. § 1983, which provides:

> Every person who under color of any statute, ordinance, regulation, custom, or usage, of

> any State . . . subjects, or causes to be subjected, any citizen of the United States . . . within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

STATEMENT OF THE CASE

Petitioner, Stevens Creek Quarry ("Quarry"), owns a construction materials mining operation located in Santa Clara County, California, which provides rock-based construction material for roads and buildings throughout the area where it is located. (E.R., p. 4, ¶ 21.) From a land use perspective, the Quarry operates pursuant to two entitlements: a nonconforming grandfathered use applicable to one portion of its property and a use permit first issued in 1950 and renewed in 1984, 1985, 1990, and 1995, which is applicable to the balance of the property. (E.R., pp. 4-5, ¶¶ 24-26.) However, and despite the existence of these vested entitlements, the Respondent, the County of Santa Clara ("County"), decided it wanted to substantially alter the way in which the Quarry would be allowed to conduct its business operations, even though it lacked the requisite legal authority to do so because of the nature of the entitlements involved. (E.R., pp. 5-11, ¶¶ 29-49.) When the Quarry objected to this course of action, the County decided to use its full force to attempt to compel the Quarry to renounce its vested entitlements, threatening to and then actually subjecting the Quarry to an unwarranted and unjustified series of occurrences, the intent of which was to compel the Quarry to renounce its vested property rights. (E.R., pp. 5-11, ¶¶ 29-49.) Essentially, these actions can best be characterized as

unwarranted governmental coercion amounting to nothing less than extortion.

In September 1996, the Quarry filed a civil rights claim under 42 U.S.C. § 1983 alleging that the County's actions violated the Quarry's substantive due process rights.[1] On December 14, 1998, the District Court Judge for the Northern District of California dismissed this claim under Fed. R. Civ. P. 12(b)(6) with prejudice.[2] The Ninth Circuit Court of Appeals affirmed the dismissal on June 29, 2000. The basis for the Ninth Circuit's decision was that Quarry's substantive due process claim was subsumed by the Fifth Amendment's Takings Clause.[3] *See* Appendix, *infra*, p. 12a-13a. Although the Ninth Circuit cited no case authority for its decision, it could only have relied on this Court's decisions in *Graham v. Connor*, 490 U.S. 386 (1989), and *Albright v. Oliver*, 510 U.S. 266 (1994). In those cases, this Court held that when an explicit constitutional provision provides protection from certain government behavior, that provision, not substantive due process, must be the basis for the plaintiff's relief. *Graham*, 490 U.S. at 395; *Albright*, 510 U.S. at 271. Those cases, however, should be viewed as inapplicable to a situation such as the one presented in this case, where there is no explicit constitutional provision pertaining to the conduct which is asserted to be constitutionally impermissible. Moreover, they should not be

---

[1] The Quarry also alleged that the County's action deprived the Quarry of its right to procedural due process. The Quarry does not challenge the dismissal of its procedural due process claim in this Petition.

[2] The District Court had previously dismissed the Quarry's claims on February 10, 1997, allowing the Quarry leave to amend.

[3] The District Court denied the Quarry's substantive due process claim on a different ground—that the County's action was supported by a rational basis. *See* Appendix, infra, p. 12a-13a. As explained below, such an approach ignores the actual nature of the Quarry's substantive due process claim, which is that the County's action impinged on the Quarry's fundamental right to be free from governmental extortion. The District Court's application of the rational basis standard of review, therefore, was inappropriate.

viewed as providing a justification for converting a plaintiff's claim into something other than what was asserted.

REASONS FOR GRANTING THE WRIT

This case involves a claim that the Quarry's substantive due process rights were violated by an outrageous course of conduct pursued by the County. (E.R. 31, p. 10, ¶ 48.) More specifically, the Quarry asserts that the County sought to use its official position as a land use authority to force the Quarry to renounce its vested property rights. (E.R. 31, pp. 8-10, ¶¶ 40, 43, 46.) This was done by the County threatening that it would modify or revoke the Quarry's land use entitlements, even though it lacked the requisite authority to do so, unless the Quarry capitulated to its various demands. (E.R. 31, p. 8, ¶ 40.) As such, the County was essentially extorting the Quarry and, in the process, grossly misusing its police power authority.

Since protection from the type of outrageous conduct involved here is not specifically provided for in the Bill of Rights, the Quarry claimed that it was protected from such abusive behavior by substantive due process. The Ninth Circuit, while acknowledging the Quarry's claim of outrageous conduct by the County, nonetheless concluded that the Quarry had failed to state a claim for which relief might be granted, basing its decision upon the notion that the Quarry should have asserted a takings claim as opposed to a substantive due process claim. As the court indicated:

> The Quarry also contends that the County violated "its substantive due process rights" when it modified the use permit. This claim is characterized by a charge of outrageous conduct that is akin to a takings claim. Here, the Quarry never attempted to show that its operations under the modified use permit would no longer be economically feasible.

> Thus, even construing the allegations of the complaint in the light most favorable to the Quarry, the Quarry still fails to state a claim for a violation of substantive due process.

Appendix, *infra.*, p. 3a.

A careful reading of this language reveals the actual position taken by the Court: namely, that, in the land use context, there can never be a substantive due process claim since all such claims are subsumed by the taking clause. Indeed, as the quoted language reveals, the Ninth Circuit has essentially concluded that outrageous conduct is a takings claim. The difficulty with this position, however, is that it completely obliterates the right to bring an action seeking recourse for the outrageous conduct itself. As such, it eliminates the very notion that a United States citizen is even protected, at least in the land use arena, from such outrageous official governmental conduct.

An analogy, which removes the doctrine espoused by the Ninth Circuit from the land use context, is perhaps helpful and can serve to illustrate the adverse consequences of following that position. For instance, imagine a situation where a person driving a car is stopped because of his race and, as a result of that stop, his car is without justification impounded. He then brings a claim for the violation of his civil rights based upon the contention that the conduct involved in actually stopping him violated his federally protected constitutional rights. If the Ninth Circuit position applied in this case were then to be followed here, he would be told that he cannot bring such a claim and that his sole recourse would be to seek compensation for the rental value of his car during the time it was illegitimately impounded. The ridiculousness of such a position is readily apparent because it denies the victim the opportunity to seek recourse for the outrageous conduct involved in stopping him in the first place. No less ridiculous is the position taken by the

Ninth Circuit in declaring that the outrageous conduct alleged in this case is not actionable and that the sole recourse available is to seek property based damages premised upon a takings claim.

The position of the Ninth Circuit has been developed over the past few years, with the disposition of this case being an unwarranted extension of earlier doctrine. In earlier cases, the Ninth Circuit had rightfully held that disguised takings claims could not be put forth as substantive due process claims simply to avoid the requirement of exhausting state judicial remedies before filing a takings claim in federal court. *See Armendariz v. Penman*, 75 F.3d 1311, 1320 (9th Cir. 1996) (en banc); *Macri v. King County*, 126 F.3d 1125, 1129 (9th Cir. 1997); *Buckles v. King County*, 191 F.3d 1127, 1138 (9th Cir. 1999). In those cases, the substantive due process claims involved were essentially takings claims and were rightfully disposed of as such. This case, however, involves much more than did those cases since here the actual claim put forth by the Quarry—that of outrageous conduct amounting to extortion—stands separate and apart from any takings claim. The Ninth Circuit's failure to recognize that point and allow the Quarry's substantive due process claim to proceed has resulted in the Quarry being denied a viable recourse for the violation of a federally protected constitutional right. It also is inconsistent with the recognition by this Court that rights other than property rights can be implicated, and violated, in the land use context.[4]

---

[4] Moreover, the Ninth Circuit's position that the Takings Clause preempts *all* substantive due process claims contradicts the position of other circuits that have considered the issue. These Circuits have concluded that the doctrine of substantive due process continues to exist in cases involving land use disputes and is subsumed only when the claim asserted is actually a disguised takings claim. *See Tri County Indus. v. District of Columbia*, 104 F.3d 455, 459 (D.C. Cir. 1997); *Bickerstaff Clay Prods. Co. v. Harris County*, 89 F.3d 1481, 1490 n.16 (11th Cir. 1996). Thus, in *Johns Corporation v. City of Houston*, the Fifth Circuit held that, before a court may conclude that the Takings Clause has

This Court's most recent recognition that non-property constitutional rights can be violated in the land use context occurred in *Village of Willowbrook v. Olech*, 120 S. Ct. 1073 (2000). There this Court, in a case involving an equal protection claim, held that the plaintiff had pled an actual violation of her constitutional rights where she had asserted that the defendant locality had singled her out for special treatment by requiring that she dedicate a larger easement than other similarly situated individuals as a precondition for being connected to the local water delivery system. *Id.* at 1075. Apparently, her contention was that she was the victim of vindictive action stemming from an earlier suit she and her late husband had filed against the locality. In any event, the *Olech* decision is indicative of this Court's recognition that there are constitutional rights, other than property rights, which can be violated in the land use context. Had that not been the case, this Court presumably would have indicated that Mrs. Olech's only recourse was to file a takings claim, not an equal protection claim. This Court, however, appears to have recognized that such a determination would have left the plaintiff without a recourse for the vindictive governmental conduct which had allegedly occurred.

---

preempted a substantive due process claim, "a careful analysis must be undertaken to assess the extent to which a plaintiff's substantive due process claim rests on protections also afforded by the Takings Clause . . . ." 214 F.3d 573, 583 (5th Cir. 2000).

The Ninth Circuit's position is also at odds with this Court's recent decision in *County of Sacramento v. Lewis*, 523 U.S. 833 (1998). There, this Court allowed the plaintiff's estate to proceed under a claim of substantive due process because this Court had found that the government conduct at issue—high speed police pursuit—was neither a "search" nor "seizure" under the Fourth Amendment. *Id.* at 843-44. In *Lewis*, this Court affirmed that substantive due process continues to protect plaintiffs from wrongful government conduct that the Constitution does not explicitly proscribe. *See also United States v. Lanier*, 520 U.S. 259, 272 n.7 (1997).

The distinction between the equal protection claim advanced in *Olech* and the substantive due process claim advanced in this case is one without any particular significance since both assertions involved the alleged denial of a fundamental constitutional right. Indeed, the entire claim advanced by the Quarry in this case is based upon the notion that an American citizen has a constitutionally-based right, albeit not specifically enumerated in the Bill of Rights, to be free of inappropriate governmental coercion and extortion. In rejecting this contention, the Ninth Circuit has essentially determined that the doctrine of substantive due process is limited and indeed that, in the land use context, it affords no per se protection whatsoever from outrageous governmental conduct unless a taking has occurred. Presumably, this notion is based upon the belief that all that can ever be implicated in a land use decision is the effects of economic regulation—an area where it has long been established that the doctrine of substantive due process may not be invoked to second guess the legitimate regulatory decisions of local land use authorities. However, that type of situation ought not to be confused with the one presented in this case where the doctrine of substantive due process is being invoked as a source of protection, not from economic regulation, but rather from outrageous governmental conduct. Clearly, to the extent such confusion is allowed to prevail, fundamental rights of American citizens will be left unprotected simply because of the subject matter context in which violations may occur.

As *Olech* illustrates, this Court recognizes that fundamental, non-property based rights are protected in the land use context just as they are in any other context where governmental action is involved. First Amendment cases from this Court, which likewise occurred against a backdrop of land use regulation, also illustrate this point. *See generally Schad v. Borough of Mount Ephraim*, 452 U.S. 61 (1981); *Erznoznick v. City of Jacksonville*, 422 U.S. 205 (1975). Similarly, this Court's decision in *Moore v. City of East*

Cleveland recognized the existence of a substantive due process right of a grandmother to live with her grandson, even though the violation of her rights occurred as part of a land use dispute. 431 U.S. 494, 502-03 (1977). Yet, despite these decisions, the Ninth Circuit in this case has indicated that there can never be a valid substantive due process claim in the land use context and that all such claims are actually takings claims and should be pled as such.

The Quarry submits that the position taken by the Ninth Circuit stems from a failure to recognize that the substantive due process doctrine, as applied in the land use context, has two separate and distinguishable components: namely, one component involving the fact that land use regulations involve economic interests and another revolving around the notion that there are certain non-economic fundamental rights which are not specifically enumerated in the Bill of Rights. The first of these components, which is all the Ninth Circuit recognizes, falls within the area where deference has traditionally been afforded to local land use decisions and where it has rightfully been determined that the appropriate recourse for inappropriate regulatory activity is a takings claim. The second, however, involves something quite different—non-economic fundamental rights—and that fact needs to be clarified by this Court so as to avoid ever increasing confusion in the federal judicial system as to the nature and appropriate recourse for the two very distinct types of substantive due process claims which have emerged in the land use jurisprudence.[5] Critical to any such

---

[5] As one commentator has observed:

> Failure to separate the two types of substantive due process claims may result in some due process claims being preempted that ought not be. If the state prohibits redheaded persons from living in certain zones, the action may be arbitrary, but it does not constitute a taking. Likewise, if a state prohibits persons who are related by blood, marriage, or adoption from living in

clarification should be the development of standards for determining what constitutes each type of claim and how one can distinguish between an actual takings situation and one involving the assertion of a non-economic based fundamental right.

The need for clarification, even in the context of the unpublished disposition of this case, becomes even more pronounced in light of the vast number, indeed thousands, of land-use decisions rendered on an annual basis throughout the United States. Adding to this fact is that the regulatory activity involved here—wherein the regulating body can easily because of community pressures become somewhat less than neutral—presents a classic case for potential governmental abuse, not only to property rights but also to non-economic fundamental rights. Given this reality, American citizens, even if they are property owners and/or business operators, deserve to have clarified that they have a means of recourse available for redress of alleged violations of their non-economic based fundamental rights, as protected by substantive due process, even if the alleged violations happen to occur in the context of a land use dispute. If this is not done, innumerable fundamental rights will be ignored for no reason other than that they are involved in a controversy involving a land use issue.

---

shared quarters, the action may violate substantive due process. The complainants deserve injunctive relief, and possibly damages, but they should not be relegated to a taking claim, where the only relief is compensation.

Thomas E. Roberts, *Takings, Due Process, and Preemption*, 29 Urb. Law. 399, 408 (1997).

CONCLUSION

For the reasons discussed above, the Quarry respectfully requests that this Court grant this petition for certiorari.

Respectfully submitted,

John M. Taylor
Taylor & Hooper
Suite 300
1435 River Park Dr
Sacramento, Ca 95815
(916) 929-5545

(Any footnotes trail end of each document)
No. 99-15066

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

STEVENS CREEK QUARRY, INCORPORATED,
Plaintiff-Appellant,

v.

SANTA CLARA COUNTY PLANNING COMMISSION, THOMAS TANNER; CHARLES REED; PAT SAUSEDO; MOHINDER MANN; BRENT VENTURA; NICOLAS HOLGUIN; DIANNE MCKENNA; MICHAEL HONDA; BLANCA ALVARADO; RON GONZALES; JAMES T. BEALL, JR.,
Defendants-Appellees.

April 28, 2000, Filed

COUNSEL:
For STEVENS CREEK QUARRY, INCORPORATED, Plaintiff - Appellant: John M. Taylor, Esq., TAYLOR, HOOPER & WILEY, Sacramento, CA.

For SANTA CLARA COUNTY PLANNING COMMISSION, THOMAS TANNER, CHARLES REED; PAT SAUSEDO; MOHINDER MANN; BRENT VENTURA; NICOLAS HOLGUIN, Defendants - Appellees: Kathryn J. Zoglin, Esq., County Government Center, San Jose, CA.

For DIANNE MCKENNA, MICHAEL HONDA; BLANCA ALVARADO; RON GONZALES; JAMES T. BEALL, JR., Defendants - Appellees: No Appearance.

JUDGES:
Before: SNEED, SCHROEDER, and TROTT, Circuit Judges.

OPINION:

MEMORANDUM[1]

Stevens Creek Quarry, Inc. ("Quarry") appeals the district court's order granting Santa Clara County Planning Commission et al.'s (collectively "County") motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6). The Quarry argues that, with regard to its claims that the County violated its procedural and substantive due process rights, the district court erred in concluding that the Quarry failed to state a claim upon which relief can be granted. We have jurisdiction pursuant to 28 U.S.C. § 1291, and we AFFIRM.

A district court's order granting a motion to dismiss for failure to state a claim under Rule 12(b)(6) is reviewed de novo. Steckman v. Hart Brewing, Inc., 143 F.3d 1293, 1295 (9th Cir. 1998). For purposes of evaluating a motion to dismiss, we take as true all allegations of material fact stated in the complaint and construe them in the light most favorable to the nonmoving party. Warshaw v. Xoma Corp., 74 F.3d 955, 957 (9th Cir. 1996).

The Quarry's first argument is that the County violated its procedural due process rights by modifying the Quarry's use permit. To prevail on a 42 U.S.C. § 1983 claim based on a violation of procedural due process, a plaintiff must establish (1) a liberty or property interest protected by the constitution, (2) a deprivation of that interest by the government, and (3)

the lack of process. Portman v. County of Santa Clara, 995 F.2d 898, 904 (9th Cir. 1993). We assume that the Quarry had a protected property interest, see Lyng v. Payne, 476 U.S. 926, 942, 90 L. Ed. 2d 921, 106 S. Ct. 2333 (1986), and, therefore, the only question is whether the County provided the Quarry with sufficient process. In this case, the evidence shows that as early as September 1995, the Quarry had notice of the charges against it -- that it was violating the conditions of the use permit related to hours of operation, dust, noise, and lighting. In addition, the County continued the hearings five times, thereby giving the Quarry several opportunities to be heard. Accordingly, the Quarry received all the process that was due. See Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 546, 84 L. Ed. 2d 494, 105 S. Ct. 1487 (1985).

The Quarry also contends that the County violated "its substantive due process rights" when it modified the use permit. This claim is characterized by a charge of outrageous conduct that is akin to a takings claim. Here, the Quarry never attempted to show that its operations under the modified use permit would no longer be economically feasible. Thus, even construing the allegations of the complaint in the light most favorable to the Quarry, the Quarry still fails to state a claim for a violation of substantive due process.

AFFIRMED.

Footnote

[1] This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by Ninth Circuit Rule 36-3.

No. 96-20727

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

STEVENS CREEK QUARRY, INCORPORATED,
Plaintiff-Appellant,

v.

SANTA CLARA COUNTY PLANNING COMMISSION, THOMAS TANNER; CHARLES REED; PAT SAUSEDO; MOHINDER MANN; BRENT VENTURA; NICOLAS HOLGUIN; DIANNE MCKENNA; MICHAEL HONDA; BLANCA ALVARADO; RON GONZALES; JAMES T. BEALL, JR.,
Defendants-Appellees.

12/17/98 Dated

I. INTRODUCTION

This Section 1983 civil rights suit arises out of the Santa Clara County Planning Commission and the Board of Supervisors' decision to modify Plaintiff Stevens Creek Quarry, Inc.'s (hereinafter "the Quarry" or "Plaintiff") use permits. The Quarry alleges that the Santa Clara County Planning Commission and the Board of Supervisors, together with their respective members, violated the Quarry's rights to substantive and procedural clue process as guaranteed in the Fourteenth Amendment to the United States Constitution.

By order dated January 14, 1997, the Court granted Defendants' motion to dismiss with leave to amend. On

February 10, 1997, Plaintiff filed a Second Amended Complaint. On March 3, 1997, all Defendants moved to dismiss the Second Amended Complaint pursuant to Rule 12(b)(6), Fed.R.Civ.P. The Court declined to rule on the motion and stayed the action pursuant to Railroad Comm'n of Texas y. Pullman Co., 312 U.S. 496, 61 *S.Ct.* 643, *85* L.Ed. 971 (1941).

During a case management conference conducted on November *5,* 1998, the parties expressed their desire to proceed with the case. Accordingly, the Court lifted the stay and set a hearing date for Defendants' motion to dismiss the Second Amended Complaint. The matter was heard on December 14, 1998. Based upon all pleadings filed to date, the Court GRANTS Defendants' motion to dismiss with prejudice.

II. BACKGROUND

The Quarry operates mining and equipment rental businesses on two adjacent parcels of property in Santa Clara County. One of the parcels, which the parties refer to as "Parcel A" was operating pursuant to a use permit first issued by the County of Santa Clara (hereinafter "the County") on September 20, 1950, and subsequently renewed, amended or both, on several occasions throughout 1984 to February 1995. There was no use permit issued for the second parcel, which the parties refer to as "Parcel B"

The Quarry alleges that on September 7, 1995, the Planning Commission scheduled a hearing regarding the reaffirmation, modification, or revocation of the Quarry's use permit without identifying any specific permit condition violations. The Quarry further alleges that between December 7, 1995 and June 6, 1996 it repeatedly requested, but was denied, adequate notice of any specific permit condition violations, On June 6, 1996, the Planning Commission

allegedly modified the Quarry's use permit in violation of the Quarry's constitutional rights.

The Quarry timely appealed the action of the Planning Commission to the Board asserting, among other things, that (I) the Commission had no authority to modify the use permit because it had not first identified a specific permit condition violation, and (2) the Commission failed to follow the appropriate procedures before deciding to modify the use permit. The Quarry also initiated the instant action in federal court on September 5, 1996.

On September 10, 1996, the board held a duly noticed public hearing and gave the Quarry an opportunity to be heard. The Quarry alleges that during the hearing, the Board failed to address, or even to discuss, whether the Planning Commission had failed to provide the Quarry due process. Instead, the Board allegedly improperly limited its focus to whether the Planning Commission's use permit modifications were satisfactory. Thus, the Quarry contends that the Board totally disregarded the true basis for the appeal, and thereby committed a separate due process violation. At the conclusion of the meeting, the Board voted unanimously to modify the Quarry's use permit conditions.

On December 17, 1996, the Board issued "findings" in support of its vote to modify the Quarry's use permit. The Quarry alleges that these findings fail to provide a legal basis for the Board's decision. The Quarry further alleges that the Board modified the use permit by adding "new and onerous conditions."

On March 14, 1997, the Quarry filed a writ and complaint in the Superior Court of Santa Clara County pursuant to California Code of Civil Procedure 1094.5, naming as defendants the Santa Clara County and the Board of Supervisors. The matter is still pending.

On February 10, 1997, the Quarry filed a Second Amended Complaint, which includes claims for denial of its substantive and procedural due process rights. The Quarry seeks consequential damages ranging from two million to twenty million dollars as well as punitive damages ranging from one million to twenty million dollars against each of the Defendants,

Defendants presently move to dismiss the Second Amended Complaint. First, Defendants assert that the appropriate vehicle for the Quarry's complaints is a petition for writ of mandate in state court. Second, Defendants assert that the Second Amended Complaint fails to state causes of action upon which relief may be based because it does not include sufficient allegations that plaintiff's procedural or substantive due process rights were violated. Defendants further assert that none of the acts described in the Second Amended Complaint rises to the level of a constitutional violation. Lastly, Defendants assert that the procedural due process claim must fail because the Quarry has not alleged that a protected property interest has been taken or that the procedural safeguards were inadequate.

III. STANDARDS

Pursuant to Rule 12(b)(6), a complaint may be dismissed for failure to state a claim upon which relief can be granted. For purposes of evaluating a motion to dismiss, the complaint is construed in the light most favorable to plaintiff and its allegations are taken as true. Abramson v. Brownstein, 897 F.2d 389 (9th Cir. 1990). Dismissal can be based on either the lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory. Balistreri V. Pacifica Police Dept., 901 F'.2d 696, 699 (9th Cir. 1990); Robertson v. Dean Witter Reynolds. Inc., 749 F.2d 530, 533-534 (9th Cir. 1984).

As to those portions of a complaint which the district court finds do not state a claim for relief, leave to amend is ordinarily given freely. Fed.R.Civ.P. 15(a). A complaint or any claim in it should be dismissed without leave to amend only if "it is absolutely clear that the deficiencies of the complaint could not be cured by amendment. Noll 809 F.2d 1446, 1448 (9th Cir 1987). However, leave to amend need not be given if the plaintiff has repeatedly failed to cure deficiencies by previous amendments or if further amendments arc likely to be futile. Allen v. City of Beverly Hills, 911 F.2d 367, 373 (9th Cir. 1990).

IV. DISCUSSION

To prevail on a Section 1983 claim, the Quarry must plead and ultimately prove that its alleged injuries amounted to a constitutional deprivation, and that the Defendants' actions caused the constitutional violation. Sec Halverson V. Skagit County, 42 F.3d 1257, 1260 (9th Cir. 1994).[2]

The Due Process Clause of the Fourteenth Amendment protects against deprivations "of life, liberty, or property, without due process of law." U.S. Const., amend. XIV, see.1. To state a procedural due process claim, the Quarry must establish that it had a protected property interest, and if so, that it was denied this property right without the process which was due under the circumstances. Arroyo Vista Partners v. County of Santa Barbara, 732 F.Supp. 1046, 1053 (CD. Cal. 1990). "At the core of the due process clause is the right to notice and a hearing 'at a meaningful time and in a meaningful manner.'" Sinaloa Lake Owners Association v. City of Simi Valley, 882 P.2d 1398, 1405 (9th Cir. 1989).

A. The Quarry Fails to Allege Deprivation of Procedural Due Process

The Quarry alleges that Defendants violated its procedural due process rights when they "(1) failed to provide [the Quarry] with reasonable and meaningful notice regarding what use permit conditions it had allegedly violated; (2) conducted a hearing on September JO, 1996, characterized by bias and predetermined outcome; and (3) failed to provide a written set of findings which adequately described the legal basis for the action taken and the reasoning process employed." Second Amended Complaint, ¶49.[3]

The Quarry's allegation that Defendants failed to provide reasonable and meaningful notice of use permit violations is nothing more than a legal conclusion unsupported by a factual basis. As such, the Court need not accept it as true. See e.g. Papasan v. Allain, 478 U.S. 265, 286 (1986); see also. McGlinchy v. Shell Chem. Co., 845 F.2d 802, 810 (9th Cir. 1988). Moreover, the exhibits attached to the Quarry's original complaint demonstrate that the Quarry was given notice as early as September 1995 that the Commission was concerned with the Quarry's hours of operation and accompanying noise, dust, and bright lights. Complaint, Exs. 1-6. On December 13, 1995, the Planning Commission also notified the Quarry that "the legal

non-conforming use [for Parcel B] had substantially expanded beyond its historical scale and nature.

Furthermore, between January and June of 1996, the Quarry's counsel was corresponding regularly with the Planning Commission. By June of 1996, the Quarry's attorney was so familiar with the Commission's concerns that the parties attempted negotiating a resolution "to the issues stemming from the ongoing operations at the Stevens Creek Quarry," including truck speed, hours of operation, dust, noise, and lighting. Complaint, Ex. 6.

The Court also takes judicial notice of the various administrative records and reports submitted by Defendants. Mack v. South Bay Beer Distributors, 798 F.2d 1279, 1282 (9th Cir. 1986). These documents establish that the Quarry was given fair notice of permit use violations and numerous opportunities to be heard. The Planning Commission held a series of public meetings regarding the Quarry on February 1, 1996, April 4, 1996, May 2, 1996, June 6, 1996. The Quarry was present and spoke at each of the meetings. Therefore, the Quarry's contention that it was not provided fair notice of potential use permit violations is unpersuasive.

The Quarry's allegation that Defendants conducted a hearing on September 10, 1996 "characterized by bias and predetermined outcome" is also deficient. "In attempting to make out a claim of unconstitutional bias, a plaintiff must "overcome a presumption of honesty and integrity' on the part of decision-makers." Stivers v. 71 F.3d 732, 741 (9th Cir. 1995). A plaintiff must show that "the adjudicator 'has prejudged, or reasonably appears to have prejudged, an issue." Id. In the present case, there are no facts alleged which would suggest that any of the Defendants prejudged the outcome of the hearing. Instead, the Quarry specifically alleges that one day before the hearing, Defendant Supervisor Diane McKenna released a memo indicating that the Board

was reviewing, de nova, the Planning Commission's recent modification to the Quarry's use permit. Thus, the allegations in the Second Amended Complaint belie the Quarry's argument.

The Quarry's third theory, that the Defendants failed to provide a written set of findings, is similarly without merit. The Board's Resolution, which is attached to the Second Amended Complaint, contains adequate findings. It explains the evidence upon which the Board's decision was based, the permit violations, and the Board's authority for modifying the permit.

In summary, even if the Court assumes that the allegations in the Second Amended Complaint are true, and construes them in a light most favorable to the Quarry the Court finds that Defendants' alleged conduct simply does not rise to the level of a procedural due process violation. Therefore, the Court dismisses the Quarry's procedural due process claim,

B. Substantive Due Process

The due process clause includes a substantive component "which guards against arbitrary and capricious government action, even when the decision to take that action is made through procedures that are in themselves constitutionally adequate." Sinaloa Lake Owners Assn, v, City of Simi Valley, 882 R2d at 1407. The principle of substantive due process assures property owners of the right to be free from arbitrary or irrational actions, Arroyo Vista Partners v. County of Santa Barbara, 732 F.Supp. at 1053.

To establish a violation of substantive due process, a plaintiff must allege that the defendants' actions were "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general

welfare." Sinaloa, 882 F.2d at 1407; see also Kawaoka v. City of Arroyo Grande, 17 F.3d 1227, 1234 (9th Cir. 1994), cert. denied-- U.S. --, 115 S.Ct. 193, 130 L.Ed.2d *125* (1994). Thus, any government action which 'has no substantial relation to the public health, safety,morals, or general welfare' is arbitrary and unreasonable, and the converse is also true. Halverson v. Skagit Country, 42 F3d 1257, 1262 (9th Cir. 1995).

"The protection from governmental action provided by substantive due process has most often been reserved for the vindication of fundamental rights," such as marriage, family, procreation, and the right to bodily integrity. Halverson v. Skagit County, 42 F.3d *1257,* 1261 (9th Cir. 1994) (emphasis added), citing Aibright v, Oliver, --US. --, 114 S.Ct. 807, 812, 127 L.Ed.2d 114 (1994). The Supreme Court "has always been reluctant to expand the concept of substantive due process because guideposts for responsible decision making in this uncharted area are scarce and open-ended." Collins v. City of Harker Heights. 503 U.S. 115,125, 112 S.Ct. 1061, 117 LEd2d 261 (1992). Accordingly, where a plaintiff relies on substantive due process to challenge governmental action that does not impinge on a fundamental right, federal courts "do not require that the government's action actually advance its stated purposes, but merely look to see whether the government could have had a legitimate reason for acting as it did." Halverson v. Skagit County, 42 F.3d at 1262, citing Wedges/Ledges of California, Inc. v. City of Phoenix, 24 F.3d *56,* (56 (9th Cir. 1994); also Kawaoka v. City of Arroya Grande, 17 F.3d 1227, 1234 (9th Cir.), cert. denied --U.S. --, 115 S.Ct. 193, 130 I. Ed.2d 125 (1994), The plaintiff must demonstrate the irrational *nature* of the defendants' actions by showing that they "could have had no legitimate reason" for their decisions. See Halverson v. Skagit County, 42 F.3d at 1262, citing Kawaoka v. City of Arroyo Grande, 17 F.3d 1227, 1234 (9th Cir.), cert. denied *U.S.* --, *115* S.Ct. 193, 130 L.Ed.2d 125 (1994), If it is "at

least fairly debatable" that the decision is rationally related to a legitimate government interest, there can be no violation of substantive due process. Nelson v. City of Selma, 881 F.2d 836, 838 (9th Cir, 1989).

In the present case, the Quarry fails to allege conduct which rises to the level of a substantive due process violation. The Quarry alleges in only conclusory terms, without any factual support, that Defendants' actions were "arbitrary, irrational, and capricious in nature." Second Amended Complaint ¶48. Furthermore, the administrative reports and records demonstrate that Defendants were motivated by a legitimate concern for the public health and welfare. Specifically, the reports and records indicate that the Defendants were concerned with excessive truck traffic, excessive speed and failure to observe speed limit laws, spillage of quarry materials on public roads, excessive noise that violates the County Noise and Vibration ordinances, and expansion of quarrying activities beyond their historic scope and scale. The December 17, 1996 findings issued by the Board specifically address the public health and welfare concerns identified above. Finally, the permit use modifications ultimately imposed by Defendants also have a rational relationship to the public health and welfare concerns identified above. Therefore, the Court dismisses the Quarry's substantive due process claim.

C. Writ Of Mandate

On March 14, 1997, the Quarry filed a writ and complaint in the Superior Court of Santa Clara County pursuant to California Code of Civil Procedure § 1094.5, naming as defendants the Santa Clara County and the Board of Supervisors. The factual basis of the state court action is the same as the basis for this federal action. The writ includes a request or declaratory relief regarding the constitutionality of the local zoning regulations and a cause of action for

inverse condemnation. The matter is still pending.

The fact that there is a parallel state action pending also weighs in favor of dismissing the present federal action. A writ of mandate in state court is the preferred mechanism for resolving the parties' dispute, especially because the Quarry has not alleged any conduct by the Defendants which rises to the level of a constitutional violation. Sec Briggs v. City of Rolling Hills Estate, 40 Cal.App.4th 637, 47 Cal.Rptr.2d 29 (1995).

V. CONCLUSION

For the reasons set forth above, Defendants' motion to dismiss is GRANTED, I3ecause the Court finds that further amendments are likely to be futile, the dismissal is with prejudice.

DATED December 14, 1998

JAMES WARE
United States District Judge

This is to certify that copies of this order have been mailed to:

Attorney for Plaintiff

John Taylor
TAYLOR & HOOPER
1435 River Park Drive, Suite 300
Sacramento, CA 95815

Attorneys for Defendants

Kathryn J. Zoglin
Deputy County Counsel
70 West Hedding Street, 9th Fl
San Jose, CA 95110-1770

[1]This disposition is not appropriate for publication and may not be cited.

[2] Section 1983 provides in relevant part:

> Every person who, under color of any Statute; ordinance, regulation custom, or usage, of any State or Territory or the District of Columbia subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress

[3]For purposes of this motion, the Court assumes, without deciding, that the Quarry has a protected property interest.

No. 99-15066

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

STEVENS CREEK QUARRY, INCORPORATED,
Plaintiff-Appellant,

v.

SANTA CLARA COUNTY PLANNING COMMISSION, THOMAS TANNER; CHARLES REED; PAT SAUSEDO; MOHINDER MANN; BRENT VENTURA; NICOLAS HOLGUIN; DIANNE MCKENNA; MICHAEL HONDA; BLANCA ALVARADO; RON GONZALES; JAMES T. BEALL, JR.,
Defendants-Appellees.

June 29, 2000, Filed

OPINION:

ORDER AMENDING MEMORANDUM DISPOSITION

The memorandum disposition filed April 28, 2000, is hereby amended as follows:

Delete the second sentence of the first full paragraph on page 3 that reads:

> "To establish a violation of substantive due process, a plaintiff must prove that the challenged government action either (1)

> violates a fundamental right and is not narrowly tailored to serve a compelling state interest, or (2) violates an ordinary, nonfundamental, liberty interest and does not rationally advance some legitimate governmental purpose. See *Reno v. Flores, 507 U.S. 292, 301-06 (1993).*"

Insert the following language in its place:

> "This claim is characterized by a charge of outrageous conduct that is akin to a takings claim."

With this amendment, the panel has voted to deny the petition for rehearing. Judges Schroeder and Trott have voted deny the petition for rehearing en banc, and Judge Sneed so recommends.

The full court has been advised of the suggestion for rehearing en banc and no judge of the court has requested a vote on it. Fed. R. App. P. 35(b).

The petition for rehearing, and the petition for rehearing en banc, are DENIED.

(2)

Supreme Court, U.S.
FILED
OCT 31 2000
CLERK

No. 00-491

In the

Supreme Court of the United States

STEVENS CREEK QUARRY, INCORPORATED,

Petitioner,

versus

SANTA CLARA COUNTY PLANNING COMMISSION, THOMAS TANNER; CHARLES REED; PAT SAUSEDO; MOHINDER MANN; BRENT VENTURA; NICOLAS HOLGUIN; DIANNE MCKENNA; MICHAEL HONDA; BLANCA ALVARADO; RON GONZALES; JAMES T. BEALL, JR.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF AMICI CURIAE CALIFORNIA MINING ASSOCIATION; CONSTRUCTION MATERIALS ASSOCIATION OF CALIFORNIA IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

Dennis P. Derrick
Counsel of Record
Seven Winthrop Street
Essex, Massachusetts 01929
(978) 768-6610
Attorney for Amici Curiae California Mining Association and Construction Materials Association of California

2400

MOTION FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE

The California Mining Association (hereinafter referred to as "Mining") and the Construction Materials Association of California (hereinafter referred to as "Construction") hereby respectfully move pursuant to Rule 37 of the Rules of this Court to file the attached Brief *Amici Curiae* in support of the petition of Stevens Creek Quarry, Incorporated (hereinafter referred to "Stevens Creek") for writ of certiorari from this Court. The consent of the attorney for the petitioner Stevens Creek has been obtained. The consent of the attorney for the respondent Santa Clara County Planning Commission (hereinafter referred to as "the County") was requested but refused.

The written response of Stevens Creek to the request of Mining and Construction for the filing of the attached Brief *Amici Curiae* has been duly filed with the Clerk of this Court. The written response of the County to the request of Mining and Construction for the filing of the attached Brief *Amici Curiae* will be duly filed with the Clerk of this Court as soon as it is received.

Mining is an association of California mine operators begun in 1961 as a loosely formed group which formalized their relationship in 1977 as the California Mining Association. Its membership now includes both large and small mining operations that are responsible for most of the industrial minerals and precious metals which are produced in California. These mines operate in an array of climate zones and diverse physiographic locales throughout California. Mining also includes members in mining-related work such as consultants, attorneys, suppliers and government agencies.

Construction is a trade association composed of approximately seventy (70) aggregate and ready mix producers in Northern and Central California. Its members provide aggregate and concrete products to build roads,

bridges, buildings, homes and water systems. In addition, aggregate products are used for erosion control, landscaping and water filtration systems. Its members maintain over 250 aggregate and ready mix sites in Northern and Central California and engage in a continuing collaboration with state and local government to foster safe aggregate mining policies and reclamation efforts which return aggregate sites to productive farmlands and nature areas. The demand for aggregates caused by a growing economy and infrastructure development has outstripped aggregate supply in California because of the limited sites made available to Construction's members, part of an aggregate industry which generated $1.2 billion statewide in 1999.

The members of both Mining and Construction have a viable interest in the granting of Stevens Creek's petition for certiorari. As the demand for aggregate products grows in response to continuing population growth and the construction of new infrastructure as well as its repair and replacement, the need for identifying aggregate mining sites increases. California ranks third in the nation in the number of operating mines with 553; Texas is second with 579 mines and New York is first with 604. Although nature dictates the location of natural aggregates, the pits and quarries which serve as prime aggregate sources for economic reasons are almost always within reasonable distances of the market area where the product will be used, i.e., in and around population centers.

Prime aggregate areas are lost if housing or industrial development is built over them. Moreover, aggregate operations initially established in once rural areas are commonly extinguished or curtailed as the population centers encroach on these operations. The tension between citizens in these new residential areas and the nearby mining operations becomes inevitable and expresses itself in efforts by the citizens' regulatory bodies to require that the mining of aggregates be done far from its residential boundaries at whatever cost to the aggregate industry.

The primary issue raised by this petition is whether a mine operator possesses the substantive due process right under the federal constitution to be free from abusive government treatment where it is alleged that a regulatory authority has imposed upon it new conditions for its mining operation without legal authority and solely as a means to coerce the surrender of its legally vested property rights not subject to regulation. The question has implications extending beyond the particular situation now before the Court. Members of Mining and Construction maintain aggregate mining sites throughout California and each one has continuing contact with state and local regulatory bodies in an effort to accommodate their mining operations with nearby residential development. They should know whether the substantive due process clause protecting each citizen from abusive government behavior has viability in this land use context; and whether regulatory bodies seeking to curtail their mining operations are subject to damages and injunctive relief for the violation of their federal civil rights if they carry out that mission in an unfair, oppressive or coercive manner.

The petitioner Stevens Creek necessarily has concentrated on the particular facts of its own case. In their accompanying Brief *Amici Curiae*, Mining and Construction will address the distinct split in the federal circuit courts of appeals on the issue of whether the substantive due process clause is subsumed by the takings clause in the context of a regulatory dispute over land use. They will also address the need for this Court to fill the doctrinal void which has left the contours of substantive due process undefined in this area, threatening the survival of the mining industry itself. Finally, they will identify the policy reasons this Court should take into account in determining whether to grant the petition. Mining and Construction therefore believe that their contribution should assist the Court in giving consideration to the broader aspects of the problem which this petition presents.

October 31, 2000

Respectfully submitted,
Dennis P. Derrick
Seven Winthrop Street
Essex, Massachusetts 01929
(978)768-6610
Attorney for Amici Curiae

QUESTIONS PRESENTED.

1. Is the conflict among the circuit courts of appeals over whether abusive government conduct in regulating land use constitutes a denial of substantive due process or a taking serious enough warrant resolution by this Court?

2. Should this Court as a matter of sound social policy restate the contours of the protection afforded property owners by substantive due process in the land use context in order to cure the present doctrinal void which threatens to extinguish valuable vested property rights of the mining industry and along with those rights the mining industry itself?

TABLE OF CONTENTS

QUESTIONS PRESENTED I

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

CONSTITUTIONAL AND STATUTORY PROVISIONS 1

INTEREST OF AMICI CURIAE 2

STATEMENT 2

SUMMARY OF ARGUMENT 3

ARGUMENT 5

CONCLUSION 14

TABLE OF AUTHORITIES

FEDERAL CASES

ALBRIGHT V. OLIVER, 510 U.S. 266, 288 (1994)..... 6, 9, 11

ARLINGTON HEIGHTS V. METROPOLITAN HOUSING DEV. CORP., 429 U.S. 252, 267 (1977)..... 8

ARMENDARIZ V. PENMAN, 75 F.3D 1311, 1326 (9TH CIR. 1996)(EN BANC)..... 9

BATEMAN V. CITY OF WEST BOUNTIFUL, 89 F.3D 704, 709 (10TH CIR. 1996)..... 10

BERGER V. CITY OF MAYFIELD HEIGHTS, 154 F.3D 621 (6TH CIR. 1998)..... 9

BICKERSTAFF CLAY PRODUCTS V. HARRIS COUNTY, GEORGIA, 89 F.3D 1481, 1489-1490 (11TH CIR. 1996).... 10

BRADY V. COLCHESTER, 863 F.2D 205, 215-216 (2ND CIR. 1988)..... 8

COLLINS V. HARKER HEIGHTS, 503 U.S. 115, 125 (1992). 5, 6

CONLEY V. GIBSON, 355 U.S. 41, 45-46 (1957)..... 11

CONSTITUTION. BUCKLES V. KING COUNTY, 191 F.3D 1127, 1137 (9TH CIR. 1999)..... 9

COUNTY OF SACRAMENTO V. LEWIS, 523 U.S. 833, 843-849 (1998)..... 7, 11

DANIELS V. WILLIAMS, 474 U.S. 327, 331 (1986)..... 5, 6, 7

DENT V. WEST VIRGINIA, 129 U.S. 114, 123 (1889)..... 6

GARRITY V. NEW JERSEY, 385 U.S. 493, 498 (1967)..... 12

GERSTEIN V. PUGH, 420 U.S. 103 (1975)..... 6

GOSNELL V. CITY OF TROY, 59 F.3D 654, 657-658 (7TH CIR. 1995) 9

GRAHAM V. CONNOR, 490 U.S. 386(1989) 6, 11

GRAHAM V. CONNOR, 490 U.S. 386, 395 (1989) 6

GRAHAM. SEE TEXAS MANUFACTURED HOUSING ASS'N, INC. V. CITY OF NEDERLAND, 101 F.3D 1095, 1106 (5TH CIR. 1996) 9

LUCAS V. SOUTH CAROLINA COASTAL COUNCIL, 505 U.S. 1003, 1017-1019 (1992)..... 7

MACRI V. KING COUNTY, 126 F.3D 1125, 1128-1130 (9TH CIR. 1997) 9

MOORE V. EAST CLEVELAND, 431 U. S. 494, 501 (1977).. 5, 6

MURRAY'S LESSEE V. HOBOKEN LAND & IMPROVEMENT CO., 18 HOW. 272, 277 (1856)..... 6

POE V. ULLMAN, 367 U.S. 497, 542-543(1961)..... 5

SAMERIC CORP., INC. V. CITY OF PHILADELPHIA, 143 F.3D 582, 590-595 (3RD CIR. 1998)..... 9

SILVERMAN V. BARRY, 845 F.2D 1072, 1080 (D.C.CIR. 1988) 9

SOLDAL V. COOK COUNTY, 506 U.S. 56, 70 (1992)..... 12

SOUTH COUNTY SAND & GRAVEL V. TOWN OF SOUTH KINGSTON, 160 F.3D 834, 835 (1ST CIR. 1998)..... 8

TAKINGS CLAUSE. SEE VILLAGE OF WILLOWBROOK V. OLECH, ___ U.S.___, 120 S. CT. 1073, 1075 (2000)..... 12

TAYLOR INV., LTD. V. UPPER DARBY TP., 983 F.2D 1285, 1292-1294 (1993), CERT. DENIED, 510 U.S. 914 (1993).... 8

TRI COUNTY INDUSTRIES V. DISTRICT OF COLUMBIA, 104 F.3D 455, 459 (D.C. CIR. 1997) 9

UNITED STATES V. JAMES DANIEL GOOD REAL PROPERTY, 510 U.S. 43, 49-50 (1993) 12

UNITED STATES V. LANIER, 520 U.S. 259, 272 N.7 (1997).... 6

VILLAGE POND, INC. V. TOWN OF DARIEN, 56 F.3D 375, 378-379 (2ND CIR. 1995)..... 8

WHITLEY V. ALBERS, 475 U.S. 312(1986)..... 6

WILLIAMSON PLANNING COMM'N V. HAMILTON BANK, 473 U.S. 172, 186-200 (1985) 7

FEDERAL STATUTES

CIVIL RIGHTS ACT-42 U.S.C. SECTION 1983 ..... 1, 2, 4

OTHER AUTHORITIES

UNITED STATES CONSTITUTION, AMENDMENT IV, SECTION 1: 1

UNITED STATES CONSTITUTION, AMENDMENT V:..... 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment V:

...nor shall private property be taken for public use without just compensation.

United States Constitution, Amendment IV, Section 1:

...No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law....

Civil Rights Act–42 U.S.C. Section 1983:

Every person who under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress....

STATEMENT OF INTEREST OF THE AMICI[1]

The interest of the California Mining Association (hereinafter referred to as "Mining") and the Construction Materials Association of California (hereinafter referred to as "Construction") is set forth in their attached motion for leave to file this Brief *Amici Curiae* in support of the granting of Stevens Creek, Incorporated's (hereinafter referred to as "Stevens Creek") petition for certiorari.

STATEMENT OF FACTS RELEVANT TO THE AMICI CURIAE

Stevens Creek operates its aggregate mining and recycling operation from two different adjacent parcels along Stevens Canyon Road in Santa Clara County (Pet. App. 5-6). Mining takes place on the so-called "Front Parcel" pursuant to a use permit first issued by the respondent Santa Clara County Planning Commission (hereinafter referred to as "the County") in 1950 and then renewed in 1984, 1990 and 1995 (*Id.*). The 1995 version of the use permit, issued by the County on February 18, 1995, expires on February 18, 2015. The use permit for the Front Parcel now contains at least forty-six (46) conditions, most of which address the concerns of the surrounding neighborhoods.

As for the so-called "Back Parcel," Stevens Creek carries on mining operations there **as of right** pursuant to a legally vested, nonconforming "grandfathered" entitlement to do so. Be-cause mining on this Back Parcel is allowed as a protected nonconforming "grandfathered" right, the County is without any power to regulate this part of Stevens Creek's mining operation.

---

[1] Pursuant to Rule 37.6 of this Court, the amici curiae disclose that this brief was prepared entirely by their counsel and that he was compensated for his work by the petitioner Stevens Creek.

The core of Stevens Creek's substantive due process claim in its Second Amended Complaint is its allegation that the County, responding to some neighbors' requests to curtail mining operations on the Back Parcel, coerced Stevens Creek with the threat of imposing more onerous conditions for the Front Parcel (over which it had zoning control) so that it would surrender or renounce its vested "grandfathered" rights to mine the Back Parcel free of the County's regulatory control. It is this alleged abusive exercise of its regulatory power over one parcel by the County to coerce the surrender of a landowner's vested rights in another parcel over which it has no rightful regulatory control which lies at the heart of Stevens Creek's substantive due process claim under the Fourteenth Amendment to the federal constitution.

Importantly, Stevens Creek's only other claim for relief in its complaint alleged a denial of procedural due process for the way the County noticed and then prosecuted the use permit violations supposedly occurring on both parcels. Finally, Stevens Creek did not allege and did not seek relief for the taking of any of its property under the Fifth Amendment to the federal constitution.

SUMMARY OF ARGUMENT

1. The right of a citizen to be free from governmental coercion is one of the bundle of liberties receiving protection under the concept of substantive due process encompassed by the Fourteenth Amendment to the federal constitution. This right does not stem from the ownership of property but rather from the core liberty concept that a government should act fairly towards its citizens in all matters by not imposing its weighty power to force or coerce citizens to give up vested rights. When that coercive, oppressive conduct by the government is alleged to affect property rights, the circuit courts of appeals are in conflict whether it constitutes a violation of substantive due process warranting injunctive

relief and damages under 42 U.S.C. Section 1983, or whether it is only a taking entitling the landowner to compensation. This important conflict among the federal appellate courts should be resolved by this Court with a definitive statement in this case concerning the reach of substantive due process when raised in the context of land use regulation.

2. This Court as a matter of sound social policy should restate and redefine the contours of the protection afforded property owners by substantive due process in the land use context in order to cure the present doctrinal void which threatens to extinguish valuable vested property rights of the mining industry and along with those rights the mining industry itself. Aggregate mining must continue in order to support the demonstrated needs of increased population as well as infrastructure development and repair. Mine closures, curtailment of mining operations and ultimately the extinguishment of the mining industry itself will ensue unless this Court reestablishes the right of the mining operator to seek relief in federal court for the deprivation of substantive due process whenever a government regulatory body seeks through intimidation, fear, coercion or threats to regulate the operator's exercise of vested property rights over which the government has no power to regulate in the first place.

ARGUMENT

I. The Conflict Among the Circuit Court of Appeals Over Whether Abusive Government Conduct in Regulating Land Use Constitutes a Substantive Due Process Violation or a Taking Should Prompt this Court To Grant the Petition For Certiorari.

The concept of substantive due process has not been reduced to any specific formula and "its content cannot be determined by reference to any code." *Poe v. Ullman*, 367 U.S. 497, 542-543(1961)(Harlan, J., dissenting). As the second Justice Harlan observed,

> [T]he full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution. This "liberty" is not a series of isolated points pricked out in terms of the taking of property; the freedom of speech, press, and religion; the right to keep and bear arms; the freedom from unreasonable searches and seizures; and so on. **It is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints [by the state]....**

Id. (Emphasis supplied). See *Moore v. East Cleveland*, 431 U. S. 494, 501 (1977). The touchstone of substantive due process, then, is an individual's right to be free from the arbitrary action of government, regardless of the fairness of the procedures employed to implement that action. *Collins v. Harker Heights*, 503 U.S. 115, 125 (1992). *Daniels v. Williams*, 474 U.S. 327, 331 (1986) citing *Dent v. West*

Virginia, 129 U.S. 114, 123 (1889). It thus serves to prevent governmental power from being "used for purposes of oppression." *Daniels*, 474 U.S. at 331-332 (1986) quoting *Murray's Lessee v. Hoboken Land & Improvement Co.*, 18 How. 272, 277 (1856).

As this Court remarked in *Moore*, the broad, elastic concept of substantive due process has proven "a treacherous field" when the judicial branch gives enhanced protection to certain substantive liberties without guidance from the more specific provisions of the Bill of Rights. 431 U.S. at 502. As general matter, therefore, this Court has been reluctant to expand the concept of substantive due process "because guideposts for responsible decisionmaking in this uncharted area are scarce and open-ended." *Collins v. Harker Heights*, 503 U.S. at 125. In practice, substantive due process claims accordingly seem to be reserved for those substantial claims which are "otherwise homeless." *Albright v. Oliver*, 510 U.S. 266, 288 (1994)(Souter, J., concurring) citing *Graham v. Connor*, 490 U.S. 386(1989); *Whitley v. Albers*, 475 U.S. 312(1986); and *Gerstein v. Pugh*, 420 U.S. 103 (1975).

In *Graham v. Connor*, 490 U.S. 386, 395 (1989), this Court rejected use of the Fourteenth Amendment's substantive due process analysis and instead applied the Fourth Amendment's reasonableness standard to a claim that law enforcement officers used excessive force in the course of an investigatory stop. *Id.* The Court reasoned that because there was an "explicit textual source of constitutional protection" for the claimed misconduct, the Fourth Amendment and not any generalized notion of substantive due process would be the guide for analyzing such a claim. *Id.* Since then, this Court has noted the *Graham's* holding applies only if a constitutional claim is covered by a specific constitutional provision. *United States v. Lanier*, 520 U.S. 259, 272 n.7 (1997).

However, if no specific textual support can be identified in the Constitution for the substantive due process violation alleged, then the claim is to be analyzed using

substantive due process standards. In ruling that a high speed police chase was neither a seizure nor a search and therefore was not "covered by" the Fourth Amendment, the Court in *County of Sacramento v. Lewis*, 523 U.S. 833, 843-849 (1998) properly analyzed the claim for damages for the resulting death under substantive due process standards. *Id.* In concluding that the police pursuit did not cross the threshold of a due process violation, it stated that "conduct intended to injure in some way unjustifiable by any government interest is the sort of official action most likely to rise to the conscience-shocking level" and therefore be actionable. *Id.* at 849. See also *Daniels*, 474 U.S. at 331 ("Historically, this guarantee...has been applied to *deliberate* decisions of government officials to deprive a person of life, liberty, or property")(emphasis in original).

When Section 1983 plaintiffs allege deprivations of their federal substantive due process rights in the wake of adverse land use regulations concerning their property by state or local zoning bodies, the government defendants have resorted to the defense that under *Graham* the claim must be viewed as a "taking" under the Fifth Amendment because it provides the only specific textual support in the Constitution for such a property-based claim. In *Williamson Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 186-200 (1985), for example, this Court held that a landowner's claims of a taking together with substantive due process violations stemming from the zoning authority's regulation of his land were both unripe for federal adjudication until an inverse condemnation proceeding was concluded in state court. *Id.* at 196-200. Moreover, in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1017-1019 (1992), the Court demonstrated a willingness to analyze claims based upon allegedly burdensome or unfair land use regulations under the Takings Clause. *Id.* However, even in zoning dispute cases, the principle of substantive due process guarantees property owners the right to be free from arbitrary or irrational zoning actions. *Arlington Heights v. Metropolitan Housing Dev.*

Corp., 429 U.S. 252, 267 (1977).

With the law in this posture, the federal circuit courts of appeals are in remarkable conflict over the issue of whether a person alleging unfair or oppressive coercion by a land use authority in enforcing or implementing use restrictions upon vested property rights states a valid claim for the violation of its substantive due process rights under Section 1983, or whether such claim is subsumed by the Takings Clause of the Fifth Amendment

The First Circuit Court of Appeals has used *Graham* when considering a substantive due process claim challenging a zoning ordinance on its face as invoking only the Takings Clause protections. *South County Sand & Gravel v. Town of South Kingston*, 160 F.3d 834, 835 (1st Cir. 1998). But in that same case, it noted that if it were alleged that the town had singled the plaintiff out for special treatment or that the ordinance was specifically designed to debilitate the plain-tiff's business, a remedy would be provided for the deliberate abuse of government power, i.e., a violation of the plaintiff's right to substantive due process. *Id.* at 839 n. 5. Similarly, in *Village Pond, Inc. v. Town of Darien,* 56 F.3d 375, 378-379 (2nd Cir. 1995), the Second Circuit analyzed separately the plaintiff's substantive due process and taking claims without mentioning *Graham* in the process of invalidating an arbitrary conditioning of a zoning permit upon conveyance of property to the town. And in *Brady v. Colchester*, 863 F.2d 205, 215-216 (2nd Cir. 1988), it held that a substantive due process violation had been made out where the permitting power had no authority under state law to revoke the plaintiff's building permit; to demand that he apply for zoning permits; and to subject him to an unnecessary approval process. *Id.*

The Third Circuit in *Taylor Inv., Ltd. v. Upper Darby Tp.*, 983 F.2d 1285, 1292-1294 (1993), *cert. denied*, 510 U.S. 914 (1993), likewise analyzed the plaintiff's claim of an arbitrary and capricious denial of a use permit without invoking *Graham* or any of the protection afforded by the

Takings Clause. See also *Sameric Corp., Inc. v. City of Philadelphia*, 143 F.3d 582, 590-595 (3rd Cir. 1998). Moreover, the Fifth and Sixth Circuit Courts of Appeals have addressed substantive due process and taking claims stemming from land use regulations separately without citing *Graham*. See *Texas Manufactured Housing Ass'n, Inc. v. City of Nederland*, 101 F.3d 1095, 1106 (5th Cir. 1996); *Berger v. City of Mayfield Heights*, 154 F.3d 621 (6th Cir. 1998).

Finally, in *Tri County Industries v. District of Columbia*, 104 F.3d 455, 459 (D.C. Cir. 1997) the Court of Appeals for the District of Columbia Circuit, while noting *Graham*, held that "in this circuit at least, under *Silverman* [*v. Barry*, 845 F.2d 1072, 1080 (D.C.Cir. 1988)], the requirements of the takings clause cannot be said to exhaust the Fifth Amendment's substantive protection of property rights from governmental imposition." *Id.* citing *Albright*, 510 U.S. at 286-287 (Souter, J., concurring).

Pitched against these circuits most notably is the Ninth Circuit Court of Appeals. As typified by the case presently before the Court, the Ninth Circuit has consistently followed a strict reading of *Graham* and held that the Takings Clause is the sole source of protection for land use rights; and there is no basis for the recognition of substantive due process protection when challenging land use regulations of whatever kind in view of this explicit textual reference in the Constitution. *Buckles v. King County*, 191 F.3d 1127, 1137 (9th Cir. 1999) citing *Macri v. King County*, 126 F.3d 1125, 1128-1130 (9th Cir. 1997) and *Armendariz v. Penman*, 75 F.3d 1311, 1326 (9th Cir. 1996)(*en banc*). The Seventh Circuit likewise has held that any challenges to government misconduct in land use regulation may only be brought under the Takings Clause or the Equal Protection Clause, **not** with a claim for the denial of substantive due process. *Gosnell v. City of Troy*, 59 F.3d 654, 657-658 (7th Cir. 1995).

In *Bateman v. City of West Bountiful*, 89 F.3d 704, 709 (10th Cir. 1996), the Tenth Circuit also relied upon *Graham* to hold that a plaintiff's substantive due process and equal protection claims were subsumed into the Takings Clause. *Id.* Finally, the Eleventh Circuit Court of Appeals has held that a plaintiff's challenge to an alleged zoning change presents only a claim under the Takings Clause and not a viable claim of a substantive due process violation. *Bickerstaff Clay Products v. Harris County, Georgia*, 89 F.3d 1481, 1489-1490 (11th Cir. 1996).

Mining and Construction therefore submit that this conflict in the federal courts is an important one which deserves to be acknowledged and addressed by this Court. Without guidance from the Court, the federal courts are likely to continue to follow different paths about the viability of substantive due process in the context of land use regulation and thereby provide different constitutional rights to the citizens of the several states for no good reason. In addition, they submit that the decision of the court of appeals below is out of step with prevailing authority, that the better and more fair approach, more consistent with the thrust of this Court's decisions, is that of the majority of the circuit courts of appeals, i.e., that a plaintiff's claim of a substantive due process deprivation stemming from an alleged coercive, unfair and oppressive decision by a land use authority upon vested property rights is not inevitably one subsumed within the Takings Clause but instead states a separate, viable cause of action under the substantive due process protection of the Constitution.

II. Sound Social Policy Reasons Warrant This Court Recognizing That Substantive Due Process Protects Landowners From Land Use Regulation By Government When It Is Carried Out Unfairly, Oppressively or Coercively.

In order to resolve the issues raised by this petition, the first step is to identify the specific constitutional right allegedly infringed. *Lewis,* 523 U.S. at 841 n. 5. *Albright*, 510 U.S. at 271. *Graham*, 490 U.S. at 394. In doing so, this Court will construe the plaintiff's complaint in the light most favorable to Stevens Creek, taking the allegations as true for the purposes of the County's motion to dismiss under Fed. R. Civ. P. 12(b)(6). *Albright,* 510 U.S. at 268. *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957).

With these standards in mind, the record is clear that the core of Stevens Creek's substantive due process claim is its allegation that the County, responding to some neighbors' requests to curtail mining operations on the Back Parcel, coerced Stevens Creek with the threat of imposing more onerous conditions for the Front Parcel (over which it had zoning control) so that it would surrender or renounce its vested "grandfathered" rights to mine the Back Parcel free of the County's regulatory control. It is this alleged abusive exercise of its regulatory power over one parcel by the County to coerce the surrender of Stevens Creek's vested rights in another parcel over which it has no rightful regulatory control which lies at the heart of its substantive due process claim under the Fourteenth Amendment. No claim was made below for the taking of its property under the Fifth Amendment to the federal constitution.

In essence, it is alleged that the County's abusive, unfair and coercive conduct toward Stevens Creek, using the leverage it possessed as a zoning authority on the Front Parcel to obtain concessions from Stevens Creek for its mining operations on the Back Parcel, over which it had no

regulatory control, unfairly put the petitioner "between the rock and the whirlpool", *Garrity v. New Jersey*, 385 U.S. 493, 498 (1967), and thereby violated the mining operation's substantive due process right to be free from oppressive governmental action.

The Ninth Circuit's cryptic and dismissive description of this claim as merely "akin to a taking claim"(Pet. App. at 3) could only have been made because of the doctrinal void surrounding substantive due process in the land use context which now exists. It is a void which threatens longstanding, vested property rights of the mining industry and with it the survival of the mining industry itself. A revision of the way this Court addresses a claim of substantive due process in the context of land use regulation is now in order, if only extinguish this doctrinal void which leaves federal courts free rein to make policy judgments about the worth of such claims at the pleading stage.

Other decisions of this Court should point the way to a recognition that a substantive due process violation has been fairly made out when unfair, vindictive, illegitimate or oppressive conduct by a land use authority is alleged, regardless of a possible remedy under the Takings Clause. See *Village of Willowbrook v. Olech*, ___ U.S.___, 120 S. Ct. 1073, 1075 (2000)(Breyer, J., concurring); *United States v. James Daniel Good Real Property*, 510 U.S. 43, 49-50 (1993)
(applicability of one constitutional amendment right does not pre-empt the guarantees of another); *Soldal v. Cook County*, 506 U.S. 56, 70 (1992)("Certain wrongs affect more than a single right and, accordingly, can implicate more than one of the Constitution's demands.").

Mining operators cannot be blamed for unplanned population growth or for the inconvenience that urban sprawl inevitably brings. When the aggregate mining business operated under its vested property rights in a rural environment close to its source material, it was seen as serving the public interest, providing the foundation for a

growing economy and infrastructure and helping the population centers thrive. Yet as the population centers increasingly collide with ongoing mining operations, the vested property rights of mining operators have now been attack-ed as somehow compromising the public good, the very public good they have helped create. To deny them now the right to have any meaningful input into land use decisions affecting their vested property rights by relegating them to taking claims in the face of unfair, oppressive and coercive regulations, as the court of appeals has done here, makes neither good sense nor good social policy.

The members of the mining industry represented by Mining and Construction here de-serve to know the precise dimensions of their substantive due process rights when faced with government coercion which forces them to give their longstanding vested property rights in order to accommodate a vocal citizenry opposed to their operations. They should know whether the substantive due process clause protecting each citizen from abusive government conduct has viability in the land use context and whether regulatory bodies seeking to curtail or extinguish their mining operations are subject to damages and injunctive relief for the violation of their federal civil rights if they carry out that mission in an unfair, oppressive or coercive manner.

Successive mine closures, the curtailment of mining operations and ultimately the extinguishment of the mining industry itself will ensue unless this Court reestablishes the right of the mining operator to seek relief in federal court for the deprivation of its substantive due process rights whenever a government regulatory body seeks through intimidation, fear, coercion or threats to regulate the mining operator's exercise of vested property rights over which the government has no power to regulate in the first place.

This Court as a matter of sound social policy should therefore restate and redefine the contours of the protection afforded property owners by substantive due process in the land use context in order to cure the present doctrinal void

which threatens to extinguish valuable vested property rights of the mining industry and along with those rights the mining industry itself. Aggregate mining must be allowed to continue in order to support the demonstrated needs of an increased population, the need for residential and industrial building and the need for infrastructure development and repair.

CONCLUSION

For all of the reasons identified herein, a writ of certiorari should issue to review the decision of the United States Court of Appeals for the Ninth Circuit and, ultimately, to vacate the judgment and remand the cause to the District Court for further proceedings; or provide the petitioner such other relief as is fair and just in the circumstances.

Respectfully submitted,
Dennis P. Derrick
Seven Winthrop Street
Essex, Massachusetts 01929
(978)768-6610
Attorney for Amici Curiae

(3)

No. 00-491

Supreme Court, U.S.
FILED
NOV 1 2000
CLERK

In The

Supreme Court of the United States

STEVENS CREEK QUARRY, INC.,

Petitioner,

vs.

SANTA CLARA COUNTY PLANNING COMMISSION, THOMAS TANNER, CHARLES REED, PAT SAUSEDO, THOMAS KRUSE, MOHINDER MANN, BRENT VENTURA, NICOLAS HOLGUIN, SANTA CLARA COUNTY BOARD OF SUPERVISORS, DIANNE MCKENNA, MICHAEL HONDA, BLANCA ALVARADO, RON GONZALES and JAMES T. BEALL, JR.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

ANN MILLER RAVEL, County Counsel
KATHRYN J. ZOGLIN, Deputy County Counsel*
County Government Center, East Wing
70 West Hedding Street, Ninth Floor
San Jose, California 95110-1770
Telephone: (408) 299-2111

Attorneys for Respondents
Santa Clara County Planning Commission, et al.

**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

2000

QUESTION PRESENTED

Whether the Stevens Creek Quarry stated a Fourteenth Amendment substantive due process violation by alleging that its property rights were violated by "government coercion."

PARTIES

Stevens Creek Quarry, Inc., is the petitioner here and the plaintiff below. Respondents/defendants are: the Santa Clara County Planning Commission; Santa Clara County Planning Commissioners Thomas Tanner, Charles Reed, Pat Sausedo, Mohinder Mann, Brent Ventura, and Nicolas Holguin; Santa Clara County Board of Supervisors; and Santa Clara County Board of Supervisors members Dianne McKenna, Michael Honda, Blanca Alvarado, Ron Gonzales, and James T. Beall, Jr.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

PARTIES ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

Cases iv

Rules iv

OPINIONS BELOW 1

INTRODUCTION 1

STATEMENT OF THE CASE 2

REASONS FOR DENYING THE PETITION 5

I. THE COURT PROPERLY HELD THAT THE QUARRY FAILED TO STATE A SUBSTANTIVE DUE PROCESS CLAIM 5

II. THE PETITION SHOULD BE DENIED BECAUSE NO CONFLICT EXISTS 8

III. THE QUARRY'S CITATION TO AN EQUAL PROTECTION DECISION FAILS TO PRESENT A BASIS FOR REVIEW 10

CONCLUSION 12

APPENDIX ..... App. 1

TABLE OF AUTHORITIES

Page

CASES

Albright v. Oliver, 510 U.S. 266, 114 S.Ct. 807, 127 L.Ed.2d 114 (1994).....5, 6

Armendariz v. Penman, 75 F.3d 1311 (9th Cir. 1996) ...5, 6

Bickerstaff Clay Products v. Harris County, 89 F.3d 1481 (11th Cir. 1996)..... 9

Buckles v. King County, 191 F.3d 1127 (9th Cir. 1999).....5, 6

County of Sacramento v. Lewis, 523 U.S. 833, 118 S.Ct. 1708, 140 L.Ed.2d 1043 (1998) 10

Graham v. Connor, 490 U.S. 386, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989)..... 5

Johns Corporation v. City of Houston, 214 F.3d 573 (5th Cir. 2000).....8, 9

Macri v. King County, 126 F.3d 1125 (9th Cir. 1997) ...5, 6

Moore v. City of East Cleveland, 431 U.S. 494, 97 S.Ct. 1932, 52 L.Ed.2d 531 (1977)..... 6

Tri County Industries, Inc. v. District of Columbia, 104 F.3d 455 (C.A.D.C. 1997).....9, 10

United States v. Lanier, 520 U.S. 259, 117 S.Ct. 1219, 137 L.Ed.2d 432 (1997)..... 10

Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 47 S.Ct. 114, 71 L.Ed. 303 (1926)..... 9

Village of Willowbrook v. Olech, 528 U.S. 1073, 120 S.Ct. 1073, 145 L.Ed.2d 1060 (2000) 2, 10, 11

RULES

Federal Rules of Civil Procedure

Rule 12(b)(6) 4

OPINIONS BELOW

On December 14, 1998, the District Court granted defendants' motion to dismiss the Quarry's second amended complaint with prejudice. On April 28, 2000, the Ninth Circuit issued a Memorandum affirming the ruling by the District Court. The Quarry does not accurately quote the actual Ninth Circuit Memorandum filed on April 28, 2000. Rather, the Quarry incorporates the changes subsequently ordered by the Ninth Circuit on June 29, 2000. *See* Appendix to this brief for an accurate presentation of the original Memorandum.

The Quarry filed a petition for rehearing or *en banc* review. On June 29, 2000, the Ninth Circuit issued an Order Amending Memorandum Disposition in which it denied the Quarry's requests and amended its original Memorandum. The Quarry accurately quotes the Order Amending Memorandum Disposition.

INTRODUCTION

The District Court and the Ninth Circuit correctly ruled that appellant Stevens Creek Quarry, Inc. ("the Quarry"), has failed to state a Fourteenth Amendment substantive due process claim. There is no issue warranting review by this Court.

The precise basis for the Quarry's request for review is unclear. The Quarry agrees that past Ninth Circuit decisions regarding substantive due process have been appropriate and proper. It appears to contend that the Ninth Circuit failed to acknowledge that the Quarry's

claim of "outrageous conduct amounting to extortion" somehow comprises a substantive due process claim under the Fourteenth Amendment. However, the Quarry cites no authority recognizing the existence of that purported right.

The Quarry seems to advance a second ground for review that is largely set forth in a footnote. This argument appears to be that a conflict exists among the lower courts. The Quarry cites no decision that conflicts with the Ninth Circuit's Memorandum. Finally, the Quarry claims that review is proper based on *Village of Willowbrook v. Olech*, 528 U.S. 1073, 120 S.Ct. 1073, 145 L.Ed.2d 1060 (2000), an opinion relating to an equal protection, not substantive due process, claim. In addition, the Quarry mischaracterizes cases, the proceedings, and the Ninth Circuit rulings in its petition.

The petition for certiorari should be denied.

STATEMENT OF THE CASE

The Quarry operates a mining and equipment rental business. The Quarry claims that it has a right to conduct these operations based on: (1) the permit for the front portion of the property (Parcel A), and (2) the "nonconforming 'grandfathered' right" on the back portion of the property (Parcel B). In 1950, Santa Clara County first issued a use permit for the front portion of the Quarry's property. In 1984, 1985, 1990, and 1995, the County renewed the use permit. Every time the permit was renewed, the permit was also modified.

Under local ordinances, the County Planning Commission may revoke or modify a use permit under certain circumstances, including if it finds violations of use permit conditions or a "nuisance or detriment to the public health or safety" arising from an activity allowed by the use permit. The Planning Commission may modify the conditions of or add new conditions to use permits following a duly noticed hearing.

According to the use permit issued to the Quarry on February 18, 1995, a failure to comply with all the conditions of the permit "will render the permit subject to revocation." In response to community complaints that the Quarry had violated a number of permit conditions, the Planning Commission conducted a series of hearings during a nine month period. The Planning Commission encouraged a "Good Neighbor Committee" to work with the Quarry to achieve a resolution without the need for formal County intervention. The Planning Commission ultimately concluded that the non-conforming use of the back portion of the property (Parcel B) had expanded beyond the historic scope and the use permit applied to both the back portion (Parcel B) and the front portion (Parcel A) of the property.

The Quarry appealed the determinations of the Planning Commission to the Santa Clara County Board of Supervisors. On October 29, 1996, and September 10, 1996, the Board of Supervisors held public hearings to review the Planning Commission's decision on a *de novo* basis, as required by local ordinance. The Board of Supervisors also received public testimony.

On December 17, 1996, the Board of Supervisors issued its findings in a formal resolution. The Board of Supervisors determined that the Quarry was not complying with a number of permit conditions, including hours of operation, truck, traffic, speeding, spillage on the roads, and noise and vibration levels. The Board concluded that these violations constituted a nuisance and detriment to the health and safety of the community. The Board of Supervisors determined that it had received "substantial evidence" that the quarrying operations had significantly expanded beyond their historic scope and scale, to the detriment of "public health and safety." It made minor alternations to the use permit conditions. It also asked County staff to analyze and to report on the status of quarrying activities on Parcel B.

The Quarry filed suit in federal court claiming that Santa Clara County had violated its procedural and substantive due process rights under the Fourteenth Amendment. The District Court dismissed the Quarry's second amended complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. The Ninth Circuit affirmed the District Court ruling. The Quarry appeals only the ruling dismissing the substantive due process claim. The Quarry also filed suit in California state court challenging the County's actions on similar grounds. The trial court ruled for the County and the Quarry has appealed that decision to the California Court of Appeal.

REASONS FOR DENYING THE PETITION

I. THE COURT PROPERLY HELD THAT THE QUARRY FAILED TO STATE A SUBSTANTIVE DUE PROCESS CLAIM

The Quarry contends that two cases that were not cited in the Ninth Circuit Memorandum – *Graham v. Connor*, 490 U.S. 386, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989) and *Albright v. Oliver*, 510 U.S. 266, 114 S.Ct. 807, 127 L.Ed.2d 114 (1994) – "should be viewed as inapplicable to a situation such as the one presented in this case, where there is no explicit constitutional provision pertaining to the conduct which is asserted to be constitutionally impermissible." Petition at 3. The Quarry argues that these decisions "should not be viewed as providing a justification for converting a plaintiff's claim into something other than what was asserted." *Id.* at 3-4.

The Quarry agrees that the Ninth Circuit cases *Buckles v. King County*, 191 F.3d 1127, 1138 (9th Cir. 1999); *Macri v. King County*, 126 F.3d 1125, 1129 (9th Cir. 1997); and *Armendariz v. Penman*, 75 F.3d 1311, 1320 (9th Cir. 1996) were properly decided. Petition at 6. It characterizes these three decisions as holding that substantive due process claims were "essentially taking claims and were rightfully disposed of as such." *Id.* The Quarry contends that its claim is different, although it fails to explain the basis for this conclusory assertion. Because the Ninth Circuit Memorandum is entirely consistent with these three cases that the Quarry states were properly decided, review of this petition should be denied.

In *Armendariz v. Penman*, the Court explained that "the use of substantive due process to extend constitutional protection to economic and property rights has been largely discredited." It continued:

> Rather, recent jurisprudence restricts the reach of the protections of substantive due process primarily to liberties "deeply rooted in this nation's history and tradition." *Moore* [*v. City of East Cleveland*], 431 U.S. at 503, 97 S.Ct. at 1937. Thus, the Fourteenth Amendment protects against a State's interferences with "personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education," as well as with an individual's bodily integrity.

Armendariz v. Penman, 75 F.3d at 1319 (citations omitted). *See Albright v. Oliver*, 510 U.S. at 273 ("The protections of substantive due process have for the most part been accorded to matters relating to marriage, family, procreation, and the right to bodily integrity"). The very cases cited by the Quarry confirm the reluctance to analyze land use claims under the general substantive due process clause. They hold that such claims are more appropriately examined as Fifth Amendment claims under the Takings Clause. *See Buckles v. King County*, 191 F.3d at 1138; *Macri v. King*, 126 F.3d at 1128-29; *Armendariz v. Penman*, 75 F.3d at 1320. The Quarry is attempting to do precisely what the *Macri* opinion says it cannot do: "Appellants, however, cannot sidestep *Armendariz* by recharacterizing their claim as lying solely in substantive due process." *Macri*, 126 F.3d at 1129.

The Quarry incorrectly posits that "the Ninth Circuit in this case has indicated that there can never be a valid

substantive due process claim in the land use context and that all such claims are actually takings claims and should be pled as such." *Id.* at 9. The Quarry misconstrues the Ninth Circuit's Memorandum. Rather, the Ninth Circuit merely held that the Quarry's characterization of its particular charge of "outrageous conduct" based on the modification of its use permit as a substantive due process violation "is akin to a takings claim." Petition at 17a. The Ninth Circuit Memorandum explained that the quarry's claim was insufficient because "the Quarry never attempted to show that its operations under the modified use permit would no longer be economically feasible." *See* Appendix at App. 1. This ruling is entirely consistent with the cases the Quarry argues were properly decided.

Toward the end of its petition, the Quarry suggests that review should be granted by this Court to "clarify" the existence of "non-economic fundamental rights" so as to "avoid ever increasing confusion" regarding substantive due process claims in the land use context. Petition at 9. This argument is puzzling. The Quarry cites no Circuit that recognizes these unidentified "non-economic fundamental rights" under the substantive due process clause and neglects to describe the specific nature of any existing "confusion." The Quarry refers to "the vast number, indeed thousands, of land-use decisions" issued every year. *Id.* at 10. However, it fails to cite a single decision that raises the unusual argument it asks this Court to review. The reason is clear: no such jurisprudence exists.

II. THE PETITION SHOULD BE DENIED BECAUSE NO CONFLICT EXISTS

It is difficult to discern the precise nature of the conflict or inconsistency among decisions that the Quarry believes exists. The Quarry asserts that the Ninth Circuit's position in this case "is inconsistent" with the rulings that "property rights can be implicated, and violated, in the land use context." Petition at 6. At the same time, the Quarry fails to explain the meaning or basis of this assertion.

It is only in a footnote that the Quarry addresses the purported conflict among the Circuits. In note 4, it argues that "the Ninth Circuit's position that the Takings Clause preempts all substantive due process claims contradicts the position of other circuits that have considered the issue." Petition at 6, n.4. The Quarry mischaracterizes the Ninth Circuit ruling. The Ninth Circuit Memorandum does not state that property rights can never be implicated or violated in the land use context. Again, the Memorandum was limited to whether the Quarry had stated a substantive due process claim. The decision merely indicated that the allegations made by the Quarry were more akin to a takings claim.

Even if the Quarry had accurately portrayed the Court's decision, the cases the Quarry cites in note 4 do not conflict with the Ninth Circuit Memorandum. For example, the Quarry cites *Johns Corporation v. City of Houston*, 214 F.3d 573 (5th Cir. 2000). In that case, property owners claimed that the City of Houston violated their Fifth, Eighth, and Fourteenth Amendment rights when it impeded their efforts to rehabilitate a building

and issued demolition orders. The Court held that the complaint stated a substantive due process claim by alleging that some city ordinances were unconstitutionally vague, both facially and as applied. *Johns Corporation,* 214 F.3d at 585. The Quarry makes no such allegation.

The basis for the Quarry's reliance on *Bickerstaff Clay Products v. Harris County,* 89 F.3d 1481, 1490, n.16 (11th Cir. 1996) is also obscure. The Eleventh Circuit explained that:

> The substantive component of the Due Process Clause prohibits a government entity from applying to a property a zoning classification that bears no relationship to 'public health, safety, morals, or general welfare' and thus is beyond the government's police power. *See Village of Euclid v. Ambler Realty Co.,* 272 U.S. 365, 395, 47 S.Ct. 114, 121, 71 L.Ed 303 (1926).

Bickerstaff, 89 F.3d at 1489. Bickerstaff argued that the zoning classification applied to his property comprised an improper exercise of police power and made the property useless. The Court concluded that because Bickerstaff's due process and Fifth Amendment takings claims were identical in scope, the plaintiff had stated a Fifth Amendment but not a Fourteenth Amendment claim. *Bickerstaff,* 89 F.3d at 1490. The Eleventh Circuit's decision thus is consistent with the Ninth Circuit Memorandum here. The Quarry also cites *Tri County Industries, Inc. v. District of Columbia,* 104 F.3d 455 (C.A.D.C. 1997). There, a builder sued the District of Columbia when its building permit was suspended. The court noted that while the basis for the substantive due process was "not

crystal clear," the builder's substantive due process claim was properly dismissed "either for want of ripeness or on the merits." *Tri County Industries*, 104 F.3d at 417.

The Quarry continues that the Memorandum of Decision is "at odds" with *County of Sacramento v. Lewis*, 523 U.S. 833, 118 S.Ct. 1700, 140 L.Ed.2d 1043 (1998). Petition at 7, n.4. Again, the Quarry's argument is unclear. The factual context of the *County of Sacramento v. Lewis* was very different from that before this Court. In *Lewis*, a passenger on a motorcycle driven by a suspect was killed in a high speed police chase. The Supreme Court concluded that there was no substantive due process violation. The Quarry cites *United States v. Lanier*, 520 U.S. 259, 272, n.7, 117 S.Ct. 1219, 137 L.Ed.2d 432 (1997) in the same footnote. That decision involved the criminal conviction of a state court judge for sexual assault. The Supreme Court remanded the case because the Court of appeal had applied an incorrect standard when it examined the "fair warning requirement." No such issue is before this Court.

III. THE QUARRY'S CITATION TO AN EQUAL PROTECTION DECISION FAILS TO PRESENT A BASIS FOR REVIEW

The Quarry's reliance upon *Village of Willowbrook v. Olech*, 528 U.S. 1073, 120 S.Ct. 1073, 145 L.Ed.2d 1060 (2000), is misplaced. Petition at 7. There, the Supreme Court recognized an equal protection violation where village authorities had treated one property owner differently than all other property owners. That decision is inapposite to the determination whether the Quarry stated a substantive due process claim. The Quarry has

never asserted an equal protection violation in this case. Nor has it alleged disparate treatment.

The Quarry continues that "[t]he distinction between the equal protection claim advanced in *Olech* and the substantive due process claim advanced in this case is one without any particular significance since both assertions involved the alleged denial of a fundamental constitutional right." Petition at 8. The Quarry fails to explain the basis for this position.

The Ninth Circuit's ruling in this case was narrow: the Quarry failed to state a Fourteenth Amendment substantive due process claim upon which relief may be based. The Quarry fails to explain how *Village of Willowbrook v. Olech* demonstrates that the complaint states a substantive due process violation under the Fourteenth Amendment.

CONCLUSION

Respondents Santa Clara County Planning Commission, *et al.*, respectfully request that this Court deny the Quarry's petition for writ of certiorari for the reasons discussed above.

Respectfully submitted,

ANN MILLER RAVEL
County Counsel
KATHRYN J. ZOGLIN
Deputy County Counsel

OFFICE OF THE COUNTY COUNSEL
70 W. Hedding Street
Ninth Floor, East Wing
San Jose, CA 95110-1770

Attorneys for Respondents Santa Clara County Planning Commission, Thomas Tanner, Charles Reed, Pat Sausedo, Thomas Kruse, Mohinder Mann, Brent Ventura, Nicolas Holguin, Santa Clara County Board of Supervisors, Dianne McKenna, Michael Honda, Blanca Alvarado, Ron Gonzeles and James T. Beall, Jr.

APPENDIX

The original Memorandum by the Ninth Circuit filed on April 28, 2000 reads:

STEVENS CREEK QUARRY, INCORPORATED

Plaintiff-Appellant,

v.

SANTA CLARA COUNTY PLANNING COMMISSION, THOMAS TANNER, CHARLES REED, PAT SAUSEDO; MOHINDER MANN; BRENT VENTURA; NICOLAS HOLGUIN; DIANNE McKENNA; MICHAEL HONDA; BLANCA ALVARADO; RON GONZALES; JAMES T. BEALL, JR.,

Defendants-Appellees.

Before: SNEED, SCHROEDER and TROTT, Circuit Judges.

MEMORANDUM

Stevens Creek Quarry, Inc. ("Quarry") appeals the district court's order granting Santa Clara County Planning Commission et al.'s (collectively "County") motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6). The Quarry argues that, with regard to its claims that the County violated its procedural and substantive due process rights, the district court erred in concluding that the Quarry failed to state a claim upon which relief can be granted. We have jurisdiction pursuant to 28 U.S.C. §1291, and we AFFIRM.

A district court's order granting a motion to dismiss for failure to state a claim under rule 12(b)(6) is reviewed

de novo. *Steckman v. Hart Brewing, Inc.*, 153 F. 3d 1293, 1295 (9th Cir. 1998). For purposes of evaluating a motion to dismiss, we take as true all allegations of material fact stated in the complaint and construe them in the light most favorable to the nonmoving party. *Warshaw v. Xoma Corp.*, 74 F.3d 355, 957 (9th Cir. 1996).

The Quarry's first argument is that the County violated its procedural due process rights by modifying the Quarry's use permit. To prevail on a 42 U.S.C. §1983 claim based on a violation of procedural due process, a plaintiff must establish (1) a liberty or property interest protected by the constitution, (2) a deprivation of that interest by the government, and (3) the lack of process. *Portman v. County of Santa Clara*, 995 F.2d 898, 904 (9th Cir. 1993). We assume that the Quarry had a protected property interest, *see Lyng v. Payne*, 476 U.S. 926, 942 (1986), and, therefore, the only question is whether the County provided the Quarry with sufficient process. In this case, the evidence shows that as early as September 1995, the Quarry had notice of the charges against it – that it was violating the conditions of the use permit related to hours of operation, dust, noise, and lighting. In addition, the County continued the hearings five times, thereby giving the Quarry several opportunities to be heard. Accordingly, the Quarry received all the process that was due. *See Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 546 (1985).

The Quarry also contends that the County violated "its substantive due process rights" when it modified the use permit. To establish a violation of substantive due process, a plaintiff must prove that the challenged government action either (1) violated a fundamental right

and is not narrowly tailored to serve a compelling state interest, or (2) violated an ordinary, nonfundamental, liberty interest and does not rationally advance some legitimate governmental purpose. *See Reno v. Flores*, 507 U.S. 292, 301-06 (1993). Here, the Quarry never attempted to show that its operations under the modified use permit would no longer be economically feasible. Thus, even construing the allegations of the complaint in the light most favorable to the Quarry, the Quarry still fails to state a claim for violation of substantive due process.

AFFIRMED.

Supreme Court, U.S.
FILED
NOV 15 2000
CLERK

(4)

No. 00-491

In the

Supreme Court of the United States

STEVENS CREEK QUARRY, INCORPORATED,

Petitioner,

versus

SANTA CLARA COUNTY PLANNING COMMISSION, THOMAS TANNER; CHARLES REED; PAT SAUSEDO; MOHINDER MANN; BRENT VENTURA; NICOLAS HOLGUIN; DIANNE MCKENNA; MICHAEL HONDA; BLANCA ALVARADO; RON GONZALES; JAMES T. BEALL, JR.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF

JOHN M. TAYLOR
Attorney for Petitioner
Taylor Hooper & Wiley
Suite 300
1435 River Park Dr
Sacramento, Ca 95815
(916) 929-5545

MARINA TRAMONTOZZI
Counsel of Record
c/o Curry & Taylor
Suite 601-S
815 15th Street, N.W.
Washington, D.C. 20005
(202) 393-1070

13pp

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

I. The Quarry's Contention is That it Pled a Valid Civil Rights Claim Based Upon an Alleged Violation of its Right to be Free of Governmental Coercion (Extortion) as Protected by Substantive Due Process. 1

II. The Ninth Circuit Court of Appeals Converted the Quarry's Substantive Due Process Claim Into a Takings Claim. 2

III. The County Fails to Understand the Quarry's Claim and Accordingly Repeatedly Makes Irrelevant Arguments. 4

IV. The County Misrepresents the Contents of the Memorandum Issued by the Ninth Circuit Court of Appeals in an Effort to Suggest That the Court of Appeals Did Not Convert the Quarry's Substantive Due Process Claim Into a Takings Claim 6

V. This Case Presents This Court With the Opportunity to Clarify the Doctrine of Substantive Due Process as it Applies in the Field of Land Use Law and Therefore the Quarry Respectively Requests That Review be Granted for That Purpose. 9

CONCLUSION 10

TABLE OF AUTHORITIES

FEDERAL CASES

ARLINGTON HEIGHTS V. METRO. HOUSING DEV. CO., 429 U.S. 252, 267(1977) 9

BICKERSTAFF CLAY PRODUCTS, INC. V. HARRIS COUNTY 89 F.3D 1481, 1490 N.16 (11TH CIR. 1996) 5

COUNTY OF SACRAMENTO V. LEWIS, 523 U.S. 833 (1998) 6

DOLAN V. CITY OF TIGARD, 512 U.S. 374 (1994) 10

JOHN CO. V. CITY OF HOUSTON 214 F.3D 573, 583 (5TH CIR. 2000) 6

LUCAS V. SO. CAROLINA COASTAL COUNCIL, 505 U.S. 1003 (1992) 10

MOORE V. CITY OF EAST CLEVELAND, 431 U.S. 494, 502-03 (1977) 9

NOLLAN V. CALIFORNIA COASTAL COMM'N, 483 U.S. 825 (1987) 10

TRI COUNTY INDUSTRIES, INC. V. DISTRICT OF COLUMBIA, 104 F.3D 455, 459 (D.C. CIR. 1997) 5

UNITED STATES V. CAROLENE PRODUCTS 304 U.S. 144, 152 N.4 (1938) 10

UNITED STATES V. LANIER, 520 U.S. 259 (1997) 6

VILLAGE OF WILLOWBROOK V. OLECH, 120 S. CT 1073 (2000) 6

I. The Quarry's Contention is That it Pled a Valid Civil Rights Claim Based Upon an Alleged Violation of its Right to be Free of Governmental Coercion (Extortion) as Protected by Substantive Due Process.

The County in its brief tends to confuse exactly what the Quarry has alleged, despite the Quarry's extensive efforts to be absolutely clear about this matter in its Petition. Therefore, it appears necessary, for the sake of clarity, to restate with as much precision as possible exactly what the Quarry alleges to this Court. Put simply, it is the Quarry's contention that its right to be free from governmental coercion, which had as its purpose compelling the Quarry to renounce its vested rights, was violated by the County. In making this claim, the Quarry was not suggesting in any way that its property had been unconstitutionally taken, although that may also have been a by-product of the County's action. Instead, what was being put forth was that the course of conduct pursued by the County was constitutionally impermissible, regardless of its ultimate impact on the Quarry's property interest, because it amounted to nothing less than extortion. It was that unacceptable conduct *itself*, independent of its economic impact, that formed the basis of the Quarry's claim.

The Quarry's claim was formulated as a Fourteenth Amendment substantive due process claim because there is no precise constitutional provision, outside the criminal procedure context, which directly protects American citizens from being subject to undue governmental coercion amounting to extortion.[1] Had such a provision existed, that specific provision would have been cited, in much the same

---

[1] Certainly, the Fifth Amendment explicitly prohibits the use of coercion in obtaining criminal confessions. Yet the absence of an explicit restriction against coercion in other contexts does not render the need for constitutional protection in those contexts any less significant.

way that First Amendment and Equal Protection violations are often made the basis of challenges brought in the land use field. That not being the case, the Quarry chose out of necessity to rely upon the more encompassing notion of substantive due process. In so placing its reliance, the Quarry was confident that, although the federal courts may be hesitant to expand the scope of liberties protected by substantive due process, at the very least that doctrine is sufficiently broad to provide a guarantee against extortion efforts by government. Still adhering to that view, the Quarry finds it odd that the County would suggest that the Constitution affords no such protection. Response Brief, p. 2.

II. The Ninth Circuit Court of Appeals Converted the Quarry's Substantive Due Process Claim Into a Takings Claim.

The basis of the Quarry seeking review from this Court arises from the fact that the Ninth Circuit Court of Appeals converted the Quarry's substantive due process claim into a takings claim, thereby rendering it a distinctly different claim then the one actually pled. In so doing, the Ninth Circuit placed reliance upon the notion that there can never be a substantive due process claim in the land use field since all such claims are merely "dressed-up" takings claims. Ultimately, the Ninth Circuit concluded that:

> The Quarry also contends that the County violated "its substantive due process rights" when it modified the use permit. This claim is characterized by a charge of outrageous conduct that is *akin to a takings claim*. Here, the Quarry never attempted to show that its operations under the modified use permit would no longer be economically feasible. Thus, even construing the allegations of the

> complaint in the light most favorable to the Quarry, the Quarry still fails to state a claim for a violation of substantive due process.

Petition, Appendix, p. 3a (emphasis added). Based upon this language, it is clear and unequivocal that the Ninth Circuit concluded that, in order to state a valid claim, the Quarry would have had to plead that the County's outrageous conduct had resulted in it being deprived of its property. Put slightly different, the Ninth Circuit's position amounts to a conclusion that the claim of outrageous conduct advanced by the Quarry was not in and of itself actionable, but is instead actionable only to the extent that it adversely affects a property interest, i.e., only to the extent that it negatively impacts an economic interest.

As the Quarry has, however, previously asserted to this Court, this position leaves the Quarry with no recourse for the actual outrageous conduct itself. Clearly, if this position is allowed to prevail, it amounts to a determination that governmental extortion is permissible so long as it does not result in a taking. Assuming that there is a right to be free of government-based extortion, this result seems untenable because it has the true potential of virtually obliterating the guaranteed right itself. Furthermore, if the constitutional right, the right to be free of governmental extortion, is cognizable in the land use context only if and when there is a taking, what logically prevents this doctrine from being extended to land use claims when alleged infractions of First Amendment or Equal Protection rights? The absurdity of such an extension is relevant, not so much because it is a real possibility, as it is an apt illustration of the core problem with the doctrine which the Quarry is requesting that this Court review.

III. The County Fails to Understand the Quarry's Claim and Accordingly Repeatedly Makes Irrelevant Arguments.

In its brief, the County states that "the precise basis of the Quarry's request for review is unclear." Response Brief, p. 2. The Quarry would submit that the difficulty addressed by the County stems less from the Quarry's lack of clarity and more from County's own failure to understand the claim being put forth by the Quarry. Nowhere is this lack of understanding more apparent than in the portion of the County's brief where it seeks to assert that no conflict exists between the circuits. In the opening paragraph of that section, the County indicates that the Quarry is looking for inconsistencies between the position taken by the Ninth Circuit Court of Appeals and the proposition, which the County quotes from the Quarry's brief, that "property rights can be implicated, and violated, in the land use context." Response Brief, p. 8. The only problem with this quote, however, is that it is a partial quote which, as employed by the County, completely distorts what was actually stated by the Quarry—doing so, in fact, in a fashion which completely reverses what the Quarry was actually asserting.

The actual language employed by the Quarry was as follows: "that *rights other than* property rights can be implicated, and violated in the land use context." Petition, p. 6. As this accurately quoted phrase makes clear, what the Quarry in seeking review was focusing upon—and indeed what constitutes the core of its claim—is the notion that other rights, and not just property rights, can be and are implicated in the land use field. Among those "other rights" the Quarry believes are implicated, and which ought to be protected, is the right to be free from governmental extortion. The County's failure to understand this most basic point relating to the Quarry's request for review from this Court is reflected in its use of the partial and inaccurate quote referenced

above. Furthermore, to formulate the issue as did the County seems rather nonsensical since presumably no one would contest the rather simple proposition that property rights are implicated in the land use context. The Quarry's overall assertion, however, is that much more than just property rights is implicated in the land use field and that, by converting the Quarry's substantive due process claim into a takings claim, the Ninth Circuit failed to recognize that fact and provide appropriate recourse.

The County's failure to recognize the actual nature of the Quarry's basis for seeking review has serious implications for several arguments made in its brief. Obviously, one of the areas which is rendered troublesome relates to the County's critique of the Quarry's suggestion that there is a conflict between the circuits regarding the proper role of the doctrine of substantive due process in the land use field. This whole discussion is, however, rendered less than cogent by the very fact that the County has mischaracterized the position with respect to which there is a lack of consistency. The reality is that the cases cited in footnote 4 of the Quarry's Petition do, in fact, indicate a lack of consistency between the position taken by the Ninth Circuit in this case and the general position put forth to this Court by the Quarry and subscribed to by other circuits.[2]

---

[2] It is the reasoning, not the facts, of the cases discussed in footnote 4 that is significant. Thus, although the claim in *Bickerstaff Clay Products, Inc. v. Harris County* differed from Quarry's, the Eleventh Circuit nonetheless made clear that substantive due process claims may go forward and that they are separate and distinct from takings claims. 89 F.3d 1481, 1490 n.16 (11th Cir. 1996). Likewise, despite the factual differences in *Tri County Industries, Inc. v. District of Columbia*, the D.C. Circuit spoke broadly in that case, holding that "the requirements of the takings clause cannot be said to exhaust the Fifth Amendment's substantive protection . . . ." 104 F.3d 455, 459 (D.C. Cir. 1997). Finally, while the Fifth Circuit in *John Co. v. City of Houston* dealt with a claim different from Quarry's, it noted, "a blanket rule . . . that . . . the Takings Clause subsumes any substantive due process claim relating to a deprivation of property is both

Another aspect of the County's brief which is adversely impacted by its failure to understand the Quarry's claim is its discussion of this Court's recent decision in *Village of Willowbrook v. Olech*, 120 S. Ct 1073 (2000). The Quarry offered that case as illustrative of the fact that this Court, as recently as this year, recognized that non-property rights can be implicated in the land use field—in that case a right of equal protection of the laws. *Id.* at 1074. As a result of not fully recognizing what the Quarry is asserting, the County dismisses *Olech* as irrelevant on the basis that it is factually distinguishable, which of course it is. Response Brief, pp. 10-11. The cited factual distinctions, however, do not render the decision inapplicable for the purpose for which it was cited since it reflects this Court's awareness of the existence of protected non-property based rights occurring in the land use context. Similarly, the County's attempt to dismiss the Quarry's reliance on *County of Sacramento v. Lewis*, 523 U.S. 833 (1998), and *United States v. Lanier*, 520 U.S. 259 (1997), on the basis of factual distinctions is unfounded. Response Brief, p. 10. Both of these cases illustrate well that this Court recognizes the existence of substantive due process guarantees, albeit in areas outside the land use context. *See Lewis*, 523 U.S. at 843; *Lanier*, 520 U.S. at 272 n.7 A central issue in this case, moreover, is whether this Court should choose to build upon these cases as well as *Olech* to clarify that fundamental rights protected by substantive due process are applicable in the land use context just as they are elsewhere. A narrow fact-based reading of cases as urged by the County, of course, deflects attention from this central issue and should accordingly be avoided.

IV. The County Misrepresents the Contents of the Memorandum Issued by the Ninth Circuit Court of Appeals in an Effort to Suggest That the Court of Appeals Did Not Convert the Quarry's

---

inconsistent with our precedents and with the approach taken by a majority of other circuit courts." 214 F.3d 573, 583 (5th Cir. 2000).

Substantive Due Process Claim Into a Takings Claim.

Throughout its brief, the County repeatedly asserts that all the Ninth Circuit Court of Appeals did in its Memorandum Disposition was conclude that the Quarry had failed to put forth a valid substantive due process claim. Response Brief, p. 7. Nothing, however, could be further from the truth as the very contents of the Memorandum Disposition reveal. Had the Ninth Circuit done as the County suggests, it would have had to conclude that there is no substantive due process right to be free from governmental extortion. Unfortunately for the County, the Memorandum contains no such conclusion. If it had, the Quarry would have appealed to this Court on that basis since it finds it inconceivable that a court would be willing to assert that governments in the United States are, consistent with constitutional principles, free to engage in activities characterized by extortion. As it was, the Ninth Circuit was quite clear about what it did: namely, it declared that the Quarry's substantive due process claim was "akin to a takings claim," thereby converting into an as yet unfiled takings claim. Petition, Appendix, p. 3a. The attempt of the County to limit the holding of the Ninth Circuit is accordingly without merit.

Interestingly enough, even the County has a difficult time maintaining its position regarding the narrowness of the holding provided by the Ninth Circuit. As the County observes, "Again, the Memorandum was limited to whether the Quarry had stated a substantive due process claim. The decision merely indicated that the allegations made by the Quarry were more akin to a takings claim." Response Brief, p. 8. Obviously, the second of these two sentences, which unlike the first actually paraphrases what the Ninth Circuit stated, undoes the first—leaving it clear that what the Court actually did was convert the Quarry's substantive due process claim into a takings claim. This situation is even more

apparent elsewhere in the County's brief where it indicates essentially that the Quarry's substantive due process claim was dismissed because it had failed to plead that its operations would no longer economically feasible. Response Brief, p. 7. That standard of economic infeasibility is obviously the one employed in assessing whether a taking has occurred—a fact which again illustrates precisely what the County wishes to avoid: namely, that what the Ninth Circuit did was convert the Quarry's substantive due process claim into a takings claim. Had this not been the case, there would have been no reason for the Ninth Circuit to employ a takings standard when indicating what was missing from the Quarry's pleadings. In any event, it is worth noting the actual wording employed by the County since it reveals the weakness of its own position:

> The Quarry misconstrues the Ninth Circuit's Memorandum. Rather, the Ninth Circuit merely held that the Quarry's characterization of its particular charge of "outrageous conduct" based on the modification of its use permit as a substantive due process violation "is akin to a takings claim." Petition at 17a. The Ninth Circuit Memorandum explained that the [Q]uarry's claim was insufficient because "the Quarry never attempted to show that its operations under the modified use permit would no longer be economically feasible."

Response Brief, p. 7.

Even the County's own remarks, therefore, fail to support its contention that the Quarry has misconstrued the Ninth Circuit Memorandum. The actual situation is that the wording of that Memorandum is quite clear and that it reveals that the Ninth Circuit converted the Quarry's substantive due process claim into a takings claim, thereby leaving the

Quarry with no actual recourse for the violation of its right to be free from governmental extortion. Indeed, much though the County wishes to argue to the contrary, this fact is simply inescapable and undeniable. It forms, moreover, the basis of the Quarry's request that this Court review and determine whether it is constitutionally permissible to totally eliminate the doctrine of substantive due process from the field of land use law.

V. This Case Presents This Court With the Opportunity to Clarify the Doctrine of Substantive Due Process as it Applies in the Field of Land Use Law and Therefore the Quarry Respectively Requests That Review be Granted for That Purpose.

As the Quarry observed in its Petition, the doctrine of substantive due process as applied in the land use context has two separate and distinguishable components: namely, one component involving the fact that land use regulations involve economic interests and another revolving around the notion that there are certain non-economic fundamental rights which are not specifically enumerated in the Bill of Rights. Petition, p. 9. In its Memorandum, the Ninth Circuit Court of Appeals confuses these two components, concluding essentially that only economic rights can be violated in the land use context. Doctrinally, this confusion has resulted in the Ninth Circuit in this case converting the Quarry's substantive due process claim into a takings, i.e. economic, claim. Elsewhere, other circuits have recognized the non-economic aspects of substantive due process as has this Court in other situations. *See, e.g., Moore v. City of East Cleveland*, 431 U.S. 494, 502-03 (1977); *Arlington Heights v. Metro. Housing Dev. Co.*, 429 U.S. 252, 267(1977). This inconsistency in doctrine accordingly needs to be recognized and resolved so that fundamental non-economic rights of American citizenship are not rendered inapplicable merely because of the subject matter context in which a violation

may occur. In addition, review of this case will present this Court with an opportunity to review and elaborate upon the two distinct aspects of the doctrine of substantive due process as they apply in the land use field. Indeed, although this Court has in recent years rendered several important opinions regarding the takings aspect of land use law,[3] the substantive due process doctrine has essentially been left untouched in the land use context for considerably over half a century.[4] It is for this reason that the Quarry respectfully requests that this Court grant certiorari so that relevant guidance regarding this doctrine and its applicability to the land use field may be provided.

Respectfully submitted,
Marina Tramontozzi
Suite 601
815 15th St NW
Washington, DC 20005
(202) 393-4141

---

[3] *See Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Lucas v. So. Carolina Coastal Council*, 505 U.S. 1003 (1992); *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987).

[4] Since the late 1930s, courts have predominantly, when resolving land use issues, interpreted footnote 4 of *United States v. Carolene Products* as virtually eliminating from Constitutional jurisprudence the notion that the doctrine of substantive due process may be invoked to protect economic interests. 304 U.S. 144, 152 n.4 (1938). In fact, the almost universal rule which has emerged is that minimal judicial scrutiny is all that is required in such situations. *See generally* Norman Williams & John M. Taylor, *American Land Planning Law*, § 5.01 (Rev. ed. 1988). This notion of substantive due process needs, however, to be sharply distinguished from that doctrine as employed by the Quarry to assert the existence and violation of a non-economic right. It is this distinction, which the Quarry has sought to draw throughout its Petition and this brief, that the Quarry believes warrants further exploration and clarification by this Court.